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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF BANKING AND FINANCE,
DIVISION OF FINANCE,

Appellants,

v.

CREDICORP, INCORPORATED,
a Texas corporation, John
Rheinfrank, individually
and as President of Credicorp,
Inc., Stevan W. Brown,
individually and as Vice
President of Credicorp, Inc.,

Appellees.
_____/

SC CASE NO. 86,601
DCA CASE NO. 94-00440
DOAH CASE NO. 93-0911

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NO. 94-440

APPELLEES' ANSWER BRIEF

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PRELIMINARY STATEMENT

In this brief, Appellant, State of Florida Department of Banking and Finance, will be referred to as the "Department." Appellees, Credicorp, Incorporated, a Texas corporation, John Rheinfrank, individually and as President of Credicorp, Inc., and Stevan W. Brown, individually and as Vice President of Credicorp, Inc., will be referred to collectively as "Credicorp."

References to the record on appeal will be designated as follows: the record submitted by the Department will be referred to as "(R._____);" references to the transcript of the hearing held below will be designated as "(T._____);" the decisions issued by the First District Court of Appeal ("District Court") and motions related thereto are included in an Appendix attached hereto and will be designated as "(A. _____)."

All emphasis in quotations is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an opinion issued by the First District Court of Appeal on July 17, 1995, which affirmed in part and reversed in part a Final Order entered by the Department on January 14, 1994, ordering Credicorp to cease and desist certain activities under Chapters 520 and 687, Florida Statutes, and imposing administrative fines totalling $4,078,000 against Credicorp, Rheinfrank and Brown. (A.1-13).

The circumstances giving rise to this appeal are as follows. Credicorp was originally incorporated under the name of FAFCO in Texas in 1990. (R.138); (T.105-06). Appellee, Stevan W. Brown, is currently the President of Credicorp; an office previously held by Appellee, John Rheinfrank, until his departure from the company in the fall of 1992. (T.105-06). Mr. Rheinfrank died on October 25, 1993. Credicorp's only place of business is located in Dallas, Texas. Credicorp has no offices, employees, agents or independent contractors located in Florida. (T.109). Credicorp has never registered to do business in Florida, because it has no contacts with Florida other than by United States mail. (T.109-10).

Credicorp is engaged in the business of offering memberships to consumers nationwide, and providing certain membership services, including the ability to purchase merchandise, on a retail installment basis, from Credicorp's catalogue. (T.41, 106). Credicorp's services also include the provision of discount coupons for retail establishments, and privilege card benefits for discounts at hotels and car rental agencies. (T. 41, 106).

Potential members are solicited by means of an invitation mailed by Credicorp to consumers nationwide. (T.110). The invitation sent by Credicorp to potential members generally contains the following representational language:

> Congratulations (customer name), You have been pre-approved for a Gold Card with a $10,000 line of credit.....
> Mail your $29.95 annual fee...to activate your credit immediately.....
> If you are not completely satisfied with your new Gold Card, you have a 30-day satisfaction or refund of money guarantee.....
> Credit provider provides credit services only to its members and is not affiliated with any financial institution, bank or other entity. (R.294).

Consumers who respond to the invitation by remitting $29.95 to Credicorp become Credicorp members. (T.110). Upon receipt of the membership fee, Credicorp forwards the new member a membership package containing a catalogue, discount coupons and an offer to join the Privilege System at no extra charge. (T.111). A Credicorp membership does not entitle members to purchase from other retail sellers, or to obtain cash or loans of money from any entity, including Credicorp. (T.111-12).

Credicorp does not loan or attempt to make loans of money to its members. (T.60-1, 112). The "line of credit" offered by Credicorp is solely limited to Credicorp's ability to offer its members a credit line of up to $10,000 for the purchase of merchandise from its catalogue. (T.111). Like other retail sellers, Credicorp uses the term "Gold Card" on its invitations because that phrase is widely recognized as offering a preferred or elevated level of service. (T.112). The Gold Card is not used to

purchase merchandise from Credicorp or any other retailer (T.114), and cannot be used to secure loans or cash advances. (T.114).

Members desiring to purchase merchandise from Credicorp complete an order form, enclose fees for shipping and handling (and any other amount up to the total purchase price), and mail the order to Credicorp in Dallas, Texas. (T.115-116). Upon receipt, Credicorp accepts the order after verifying current membership, checking the status of the member's account, and verifying the availability of items ordered. (T.115-116). If accepted, Credicorp packs and ships the merchandise from Texas to the member via interstate carrier. (T.115-16).

In July 1992, the Department initially contacted Credicorp to advise that Credicorp might be acting as a loan broker in violation of Chapter 687, Florida Statutes. (R.1224). Subsequently, the Department advised Credicorp that it might also be an unlicensed retail installment seller in violation of Chapter 520, Florida Statutes (R.1225). In response, Credicorp provided to the Department an analysis demonstrating why Credicorp was neither a loan broker nor an unlicensed retail installment seller. (R. 1171-1172; R.1227-1230).

On January 13, 1993, the Department filed an Administrative Complaint alleging that Credicorp had violated various provisions of Chapters 516, 520, 687 and 817, Florida Statutes (1991). (R.1236-1247). Specifically, the Department alleged that Credicorp was a credit service organization that had violated various provisions of Chapter 817, Florida Statutes, by: (1) making

misleading representations or omissions in the offer or sale of Credicorp's services; (2) failing to obtain a surety bond and establish a trust account; and (3) failing to utilize a statutory form contract and information sheet. (R.1240-44). Moreover, because any violation of Part III of Chapter 817, Florida Statutes, constitutes a violation of Chapter 516 pursuant to Section 516.07(1)(g), Florida Statutes, Credicorp was likewise charged by the Department with violating Chapter 516, Florida Statutes. (R.1240). The Department also claimed Credicorp was a loan broker under Chapter 687, and was violating Section 687.141, Florida Statutes, by collecting an advance fee from borrowers in exchange for its services as a loan broker, and by making misleading representations or omissions in connection with the offer or sale of its services as a loan broker. (R.1244-45). Finally, the Department alleged that Credicorp was an unlicensed retail installment seller in violation of Section 520.32(1), Florida Statutes. (R.1245). Credicorp timely filed a response to the Administrative Complaint and requested a formal hearing. (R.1248-49).

On July 23, 1993, a hearing was held before a Hearing Officer of the Division of Administrative Hearings. At the final hearing, prior to any testimony, the Department withdrew its allegations and the corresponding paragraphs of the Administrative Complaint asserting that Credicorp was a credit service organization and had violated Chapters 516 and 817, Florida Statutes. (T.31-34). Specifically, the Department dismissed paragraphs 17-20 of the

Statement of Facts, and paragraphs 22, 25, and 28-38 of the Conclusions of Law in the Administrative Complaint. (T.34-35). The Department called only its lead investigator as a witness at final hearing. No customers or other recipients of Credicorp's mailings were called to testify.

The Hearing Officer issued a Recommended Order on October 4, 1993, recommending that the Department order Credicorp to cease and desist all activities in violation of Chapter 687, Florida Statutes; levy an administrative fine against Credicorp in the amount of $3,578,000.00; and assess additional fines of $250,000.00 each against Rheinfrank and Brown in their capacity as officers of Credicorp under Chapter 687, Florida Statutes. (R.1290-1311).

On October 19, 1993, Credicorp filed exceptions to the Recommended Order which were subsequently addressed by the Department in its Final Order of January 14, 1994. (R.1312-1329). On November 9, 1993, Credicorp filed a Suggestion of Death notifying the Department of Mr. Rheinfrank's death in Dallas, Texas, on October 25, 1993. In the Final Order, the Department adopted and incorporated by reference the Hearing Officer's Preliminary Statement, Findings of Fact and Conclusions of Law except as modified to the extent that the Hearing Officer's conclusion that Credicorp's solicitations operated as a fraud or deception upon Florida residents was rejected by the Department as unfounded. (R.1349). Although the Recommended Order did not include a specific recommendation that Credicorp cease and desist any activities in violation of Chapter 520, Florida Statutes, the

Hearing Officer concluded that the Department had proved a violation of Chapter 520 which, in turn, authorized the Department to levy an administrative fine. (R.1372). Consequently, in the Department's Final Order, the Department ordered Credicorp to cease and desist all violations of Chapters 520 and 687, Florida Statutes, and assessed the penalties recommended by the Hearing Officer. (R.1351-52). Credicorp appealed the Final Order to the District Court on February 8, 1994.

On July 17, 1995, the District Court issued its opinion affirming the application of Section 687.141 of the Loan Broker Act and its associated penalties to Credicorp, but reversed the application of the licensing provisions of Section 520.32 to Credicorp as unconstitutional under the Commerce Clause of the United States Constitution. (A.1-13). In addition, the District Court certified the following question to this Court as one of great public importance:

> MAY FLORIDA IMPOSE A LICENSING REQUIREMENT AND ANNUAL FEE UPON A RETAIL INSTALLMENT SELLER THAT ACTIVELY SOLICITS AND SELLS TO FLORIDA RESIDENTS, BUT REACHES THIS STATE ONLY BY UNITED STATES MAIL AND COMMON CARRIER?

On August 1, 1995, Credicorp filed a motion for rehearing and rehearing en banc as well as a motion for certification seeking reconsideration of the application of the Loan Broker Act to its activities. (A.14-31). Similarly, the Department moved for rehearing regarding the District Court's holding that the Retail Installment Sales Act, as applied to Credicorp, violated the Commerce Clause. (A.32-37). On September 13, 1995, the District

Court issued an order denying the motions for rehearing (A.38) and a separate order granting in part Credicorp's motion for certification and certifying the following additional question to this Court as one of great public importance:

> MAY FLORIDA CONSTITUTIONALLY APPLY THE LOAN BROKER ACT, SECTION 687.14-687.148, FLORIDA STATUTES, TO AN OUT-OF-STATE RETAIL INSTALLMENT SELLER WHICH, UNDER THE COMMERCE CLAUSE, MAY NOT BE COMPELLED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY UNDER SECTION 520.32, FLORIDA STATUTES?

(A.39).

On October 6, 1995, the Department filed this appeal contesting the District Court's determination that the application of Chapter 520 to an out-of-state retail installment seller violated the Commerce Clause. (A. 40-41). This appeal was assigned Case No. 86,601, DCA No. 94-440. On October 10, 1995, Credicorp filed its Notice to Invoke the Discretionary Jurisdiction of this Honorable Court on the basis of the certified question concerning the application to Credicorp of the Loan Broker Act, which appeal was assigned Case No. 86,624, DCA No. 94-440. (A.42-45). This Court postponed its decision on jurisdiction and ordered the filing of briefs on the merits. (A.46). On November 7, 1995, Credicorp filed a motion to consolidate the two appeals for purposes of oral argument. (A.47-49).

SUMMARY OF ARGUMENT

The Department prosecuted Credicorp under Florida's Retail Installment Sales Act, Sections 520.30, et seq., Florida Statutes (1991), for soliciting memberships in Florida without a Florida license. It has long been settled, both in Florida and under the decisions of the United States Supreme Court, that mail order houses such as Credicorp are exempt from state licensure requirements and fees in those states where they lack a physical presence. States which have ignored this "bright-line rule" have found their regulations or taxes as applied to non-resident entities stricken as violative of the Commerce Clause of the Untied States Constitution. Here, Credicorp has no physical presence in Florida by virtue of having neither offices, agents, solicitors, independent contractors, nor property in the state. It is undisputed that Credicorp's only contacts with the State of Florida are by United States mail or interstate carrier. As the District Court held, the Department's application of the Retail Installment Sales Act to Credicorp under these circumstances offends the Commerce Clause and cannot be sustained.

The Department's application of the Retail Installment Sales Act also violates the more recent Commerce Clause test formulated by the Supreme Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Under that test, a state regulation or tax does not violate the Commerce Clause if the regulation (1) is applied to an interstate activity with a substantial nexus with the regulating jurisdiction; (2) is

fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. The Florida licensing requirement contained in Chapter 520 as applied to Credicorp fails each prong of this test. More particularly, Chapter 520 fails the "substantial nexus" prong of this test since Credicorp's contacts with Florida are limited to contacts with Florida residents via the United States mail or common carrier. As has long been established and recently affirmed in Quill Corp. v. North Dakota, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), such contacts are insufficient under the Commerce Clause to sustain the application of the licensing requirement.

Even if the licensing provisions of Florida's Retail Installment Sales Act could be constitutionally applied to a foreign retail seller, it cannot be validly applied to Credicorp because the statute requires that covered retail installment contracts be entered into in Florida. The overwhelming evidence presented at final hearing established that the contracts Credicorp enters into with its Florida members are entered into in Texas -- not Florida. Accordingly, the Department is statutorily prohibited from applying the Act to Credicorp and the District Court's determination to set aside the penalties imposed on Credicorp by the Department's erroneous application of the Retail Installment Sales Act to Credicorp must be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE DEPARTMENT'S APPLICATION OF THE LICENSING PROVISIONS OF SECTION 520.32, FLORIDA STATUTES (1991) TO CREDICORP VIOLATED THE COMMERCE CLAUSE.

In the Administrative Complaint, Credicorp was charged with violating Sections 520.32(1) and 520.995(1)(a), Florida Statutes (1991) [formally Section 520.331(1)(a), Florida Statutes][1], of Florida's Retail Installment Sales Act by engaging in retail installment sales transactions without obtaining a Florida license. (R. 1245). Section 520.32 of the Act provides:

> (1) A person may not engage in or transact the business of a retail seller engaging in retail installment transactions as defined in this part or operate a branch of such business without a license, except that a license is not required for a retail seller whose retail installment transactions are limited to the honoring of credit cards issued by dealers in oil and petroleum products licensed to do business in this state.
>
> (2) An application for a license under this part must be submitted to the department on such forms as the department may prescribe by rule. If the department determines that an application should be granted, it shall issue the license for a period not to exceed two years. A nonrefundable application fee not exceeding $200 shall be set by rule and accompany an initial application for the principal place of business and each branch location of a retail installment seller.
>
> (3) A renewal fee not exceeding $200 shall be set by rule. Biennial licensure periods and procedures for renewal of

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[1] Section 520.995(1)(a), Fla. Stat. (1991) provides:

> (1) The following acts are violations of this chapter and constitute grounds for the disciplinary actions specified in subsection (2):
>
> (a) Failure to comply with any provision of this chapter, any rule or order adopted pursuant to this chapter, or any written agreement entered into with the department . . .

licenses may also be established by the department by rule. A license that is not renewed at the end of the biennium established by the department shall automatically expire and revert to inactive status. Such inactive license may be reactivated within 6 months after the expiration date upon submission of a completed reactivation form, payment of the application fee, and payment of a reactivation fee equal to the application fee. A license that is not reactivated within 6 months after becoming inactive may not be reactivated.

(4) Each license must specify the location for which it is issued and must be conspicuously displayed at that location. If a licensee's principal place of business or branch location changes, the licensee shall notify the department and the department shall endorse the change of location without charge. A licensee may not transact business as a retail installment seller except under the name by which it is licensed. A license issued under this part is not transferrable or assignable.

(5) The department may deny an initial application for a license under this part if the applicant or any person with power to direct the management or policies of the applicant is the subject of a pending criminal prosecution or governmental enforcement action, in any jurisdiction, until conclusion of such criminal prosecution or enforcement action.

(6) Each seller shall designate and maintain an agent in this state for service of process.

As used in Section 520.32(1), "[r]etail installment transaction" is defined as "a contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract or a revolving account." Section 520.31(11), Florida Statutes (1991). "Retail installment contract" or "contract" is defined as "an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments. It does not include a revolving account or an instrument reflecting a sale pursuant thereto." Section 520.31(10), Florida Statutes (1991).

Significantly, Credicorp was not charged with any other violation of the Act[2] -- only its failure to obtain a Florida license to engage in interstate retail installment sales. Throughout the proceedings below, Credicorp has steadfastly maintained that the State of Florida cannot constitutionally require out-of-state entities like Credicorp that have no physical presence in this state and whose only contacts with this State are through common carrier and the United States mail to obtain a license and pay a license fee for the privilege of engaging in the business of an interstate retail installment seller under the Commerce Clause.

Notwithstanding, the Department applied the licensing provisions to Credicorp after adopting the hearing officer's conclusion that "Florida's requirement that all retail installment sellers doing business in Florida be licensed does not unduly burden interstate commerce and does not discriminate in any way against interstate commerce." (R. 1366). The Department also

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[2] Although the Department alleged that Credicorp mailed out deceptive brochures (R. 1238) and the Act provides that false, deceptive or misleading advertising is grounds for a disciplinary action, Credicorp was not charged with deceptive advertising under the Act. See Section 520.995(1)(e), Fla. Stat. Rather, to the extent Credicorp was penalized for its allegedly deceptive advertising, those penalties were assessed under the Loan Broker Act, Section 687.141, Florida Statutes (1991), which provides a much higher penalty than authorized by the Retail Installment Sales Act. See Section 687.143, Fla. Stat. (1991)($5,000 per violation as opposed to $1,000 per violation). Given the separate regulatory schemes in Florida for retail installment sellers and loan brokers, and the exemption provided for retail installment sellers in the Loan Broker Act, Section 687.14(4), Fla. Stat. (1991), it is difficult to envision that the Florida Legislature intended for the Department to apply the prohibitions and penalties of the Loan Broker Act to retail installment sellers.

adopted the $378,000 penalty recommended by the hearing officer. (R. 1367). On appeal, the District Court, relying on a well-established line of Florida and federal case law precedent, set aside those penalties based upon its determination that the application of the licensing provisions of Florida's Retail Installment Sales Act to Credicorp violated the Commerce Clause. Based upon the authority of prior decisions of this Court and the United States Supreme Court, as applied to the facts of this case, the District Court's holding must be affirmed.

A. APPLICATION TO CREDICORP OF THE LICENSING PROVISIONS OF SECTION 520.32, FLORIDA STATUTES (1991), VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Article I, § 8, cl. 3 of the United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." "The obvious purpose of the quoted provision was to assure the free and unimpeded transportation and exchange of goods between the states." Armstrong v. City of Tampa, 118 So. 2d 195, 199 (Fla. 1960). Although the Commerce Clause is silent about the protection of interstate commerce in the absence of any action by Congress, it has been interpreted as having dormant implications which prohibit certain state actions that interfere with interstate commerce. South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U.S. 177, 185, 58 S. Ct. 510, 82 L. Ed. 734 (1938). Not all burdens upon commerce are forbidden, only those which are "undue" or "discriminatory." Nippert v. City of Richmond, 327 U.S. 416, 425, 66 S. Ct. 586, 90 L. Ed. 760 (1946)(citations omitted);

Armstrong, 118 So. 2d at 199. The states, in the exercise of the reserved police power, may enact statutes in furtherance of public health, safety and convenience that may burden interstate commerce, -- provided that such statutes are "local" in character and bear upon interstate commerce only "incidentally." Boston & M. R. Co. v. Armburg, 285 U.S. 234, 238, 52 S. Ct. 336, 76 L. Ed. 729 (1932).

The question presented by this appeal is whether Florida can impose a licensing requirement and annual fee on an out-of-state retail installment seller that solicits and sells to Florida residents, but which reaches this state only by United States mail and common carrier. Based upon the well-established precedents recognized by the District Court in its opinion, this question must be answered in the negative.

It has long been settled by the Florida Supreme Court and the United States Supreme Court that a state or local government may not constitutionally impose licensing requirements or fixed sum license fees upon out-of-state entities who merely solicit orders from residents of that state. Robbins v. Taxing District of Shelby County, 120 U.S. 489, 7 S. Ct. 592, 30 L. Ed. 694 (1887) (state statute imposing license tax upon drummers, i.e., persons soliciting trade by use of samples, is a regulation of interstate commerce and therefore unconstitutional as applied to out-of-state entities); Real Silk Hosiery Mills, Inc. v. City of Portland, 268 U.S. 325, 45 S. Ct. 525, 69 L. Ed. 982 (1925) (license and license fee imposed on solicitors taking orders for hosiery to be shipped to buyers from another state burdens interstate commerce); Nippert

v. City of Richmond, 327 U.S. 416 (1946) (reaffirmed "drummer" line of cases and held licensing ordinance unconstitutional as applied to out-of-state solicitor); National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967) (application of Illinois Use Tax Act to out-of-state mail order firm which maintains no office, no agents or solicitors, owns no property, and had no telephone listing in Illinois, is an unconstitutional burden on interstate commerce); Cason v. Quinby, 60 Fla. 35, 53 So. 741 (Fla. 1910) (license fee imposed on salesmen for Pennsylvania corporation invalid as a burden upon interstate commerce); Myers v. City of Miami, 100 Fla. 1537, 131 So. 375 (Fla. 1930) (license fee assessed on out-of-state solicitors invalid burden on interstate commerce); Olan Mills, Inc. v. City of Tallahassee, 100 So. 2d 164 (Fla. 1958) (flat sum privilege tax imposed by municipality on non-resident photographers unduly burdensome on interstate commerce and therefore invalid); Armstrong v. City of Tampa, 118 So. 2d 195 (Fla. 1960) (flat sum license tax assessed against New York corporation's salaried supervisor and individual sales representatives void as burdening interstate commerce); see also 51 Am. Jur. 2d Licenses and Permits § 22 (1970).

Significantly, the United States Supreme Court has not receded from this line of authority even in light of a pragmatic shift in Commerce Clause jurisprudence in which the Court has recognized that interstate commerce may be required to "pay its way." Nippert, 327 U.S. at 425. The Florida Supreme Court too has

consistently adhered to its earlier decisions invalidating license fees as applied to entities engaged solely in interstate commerce as evidenced by its reaffirmation of its holding in Olan Mills, Inc. v. City of Tallahassee in Armstrong v. City of Tampa, 118 So. 2d at 199. In Armstrong, the City of Tampa attempted to impose a fixed-sum license or privilege tax on local sales solicitors for Avon Products, Inc., a New York corporation. The products sold by the Avon solicitors were shipped to Florida by Avon via interstate carrier. Significantly, this Court held that the fixed-sum license tax impeded the flow of interstate commerce and therefore violated the Commerce Clause because it was imposed on the solicitors as a condition precedent to engaging in interstate commerce. Id. at 199-200.

Notably, the District Court in Armstrong had sustained the license tax based on decisions holding that interstate commerce could be required to carry its fair share of the cost of local government, id. at 198, and on the authority of a prior decision of this Court in Dorsett v. Overstreet, 154 Fla. 566, 18 So. 2d 759, 767 (1944), overruled by Armstrong v. City of Tampa, 118 So. 2d 195 (Fla. 1960), which, on rehearing, held that a broker soliciting orders for placement with out-of-state principals could be required to obtain an occupational license. Armstrong, 118 So. 2d at 200. Importantly, this Court in Armstrong specifically receded from its majority opinion on rehearing in Dorsett, finding that case to be "completely inconsistent with all of the Florida cases on the subject" and having "no regard whatever for the earlier

precedents." Armstrong, 118 So. 2d at 200-01. This Court also took the opportunity to reaffirm its holding in Olan Mills by stating:

> The effect of our holding in the last Olan Mills case simply was that the city could not carve out of the interstate process the incident of solicitation as a separate and distinct aspect of the transaction upon which the tax could be imposed. We held that the solicitation constituted an inseparable link in the chain of events. The flat sum license impost was held to be a direct tax upon the privilege of engaging in interstate commerce. It had to fall.

Armstrong, 118 So. 2d at 199. Accordingly, the United States Supreme Court's pronouncements as well as this Court's decisional history on the invalidity of licenses and flat sum license fees as applied to out-of-state entities merely soliciting business in Florida have continuing vitality and applicability to situations such as that presented by this appeal.[3]

The Department in its Initial Brief argues that the line of cases relied upon by the District Court in its opinion are inapplicable to the question presented on this appeal because in those cases the activity taxed was an integral part or inseparable link in the interstate movement of goods. The Department contends

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[3] The continuing vitality of this line of Commerce Clause cases is illustrated by the Nevada Supreme Court's recent holding in Edwards v. City of Reno, 103 Nev. 347, 742 P.2d 486, 489 (Nev. 1987), that "[t]he United States Supreme Court has made a clear distinction between those persons who solicit orders for goods to be shipped later and those persons who deliver goods at the time an order is taken. In the former case, if the goods are to be shipped in interstate commerce, any license tax imposed on the solicitor is an impermissible burden on interstate commerce." (relying on Nippert and Robbins). Additionally, for purposes of this appeal, it should be noted that the ordinances at issue in Edwards were enacted pursuant to the exercise of the police power. Edwards, 742 P.2d at 489.

that in this case "no attempt is being made to impose a fee as a condition precedent to the privilege of making sales to Florida residents." (Department's Brief at 20-21). This contention not only directly collides with this Court's holdings in Olan Mills and Armstrong, but also with the express language of Section 520.32(1). That section of the statute prohibits a person from engaging in or transacting the business of a retail installment seller without a license, and conditions the issuance of a license upon the payment of a $200 fee. Fla. Stat. § 520.32(2).[4] Therefore, contrary to the Department's claim, Florida does in fact impose a fee under Section 520.32(1) as a condition precedent to the privilege of Credicorp soliciting and making sales to Florida residents.

Further, Credicorp, which maintains no offices, employees, or agents in Florida (T. 109), engages solely and exclusively in interstate commerce since its business activities consist entirely of retail mail order solicitation and sales. (T. 110); see National Bellas Hess, 386 U.S. 753, 759 (mail order transactions where seller's only connection with customers in the state is by common carrier or the United States mail is exclusively interstate in character). Therefore, the only incident of Credicorp's business to which the required license and fee could apply is the solicitation Credicorp sends through the United States mail to

[4] Additionally, the failure to obtain a license is punishable by both monetary and criminal penalties. See §§ 520.39 and 520.995, Fla. Stat.

Florida residents.[5] Because this kind of solicitation is an inseparable link in the chain of interstate commerce and there is no separate and distinct intrastate incident involved, Olan Mills, 100 So. 2d at 165; Armstrong, 118 So. 2d at 199, the licensing requirement imposed on Credicorp's business, by definition, burdens interstate commerce. Consequently, the line of cases beginning with Robbins and continuing through Nippert is dispositive of the issue presented in this appeal.

The Department in its Brief also places undue emphasis on the fact the fee imposed for obtaining the license under Section 520.32 is part of a regulatory scheme and is designated as a "fee" and not as a "tax." (Department's Brief at 11-16). This is a distinction without a difference under the facts of this case. In Real Silk Hosiery Mills, Inc. v. City of Portland, 268 U.S. at 335-36, the Supreme Court invalidated an ordinance as applied to out-of-state solicitors which required the solicitors to "secure a license and file a bond" and pay a "license fee." In that case, as here, the "fee" was not labeled as a "tax."

Further, although the license fees in the "drummer" cases were frequently denominated as "taxes", they were often imposed as part of an overall regulatory scheme enacted under the police power of the state or local government. For example, in Real Silk Hosiery, the ordinance at issue was a regulatory measure that was enacted with the express purpose of preventing possible frauds, and in

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[5] The Retail Installment Sales Act does not impose a gross receipts tax on products which come to rest in this state.

addition to the licensing requirement, also required the posting of a bond to ensure final delivery of the ordered goods. 268 U.S. at 335-36. The fact that this requirement was a regulatory measure enacted under the police power of the city did not prevent the invalidation of the ordinance on Commerce Clause grounds. 268 U.S. at 335-36; see also discussion of Real Silk Hosiery by this Court in Myers v. City of Miami, 100 Fla. 1537, 131 So. 375, 379 (Fla. 1930). Moreover, even though the invalidated ordinance was an early form of consumer protection regulation, the Supreme Court nonetheless concluded that an express purpose to prevent possible frauds did not justify legislation that interferes with the free flow of interstate commerce. Real Silk Hosiery, 268 U.S. at 336.

Similarly, in State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (N.C. 1951), the Supreme Court of North Carolina, relying on Nippert, struck down a fixed-sum bonding requirement imposed under the police power of the state. The following requirement was part of a regulatory scheme designed to prevent the perpetration of fraudulent practices by photographers. In invalidating the bonding requirement, the court stated:

> It makes no material difference that in the Nippert case the fixed-sum burden imposed on the incident of solicitation took the form of a license tax. Whereas, in the instant case the fixed-sum burden stems from a bonding requirement imposed under colorable exercise of the police power. It is the ultimate effect of the fixed-sum burden that controls. Where sanctions imposed by a regulatory measure bear no substantial relation to the legitimate objects sought to be obtained, and impose direct burdens and stifling restrictions upon interstate commerce, it matters not that such burdens be imposed under guise of the police power, rather than the taxing power.

Mobley, 66 S.E.2d at 21; see also Edwards v. City of Reno, 742 P.2d at 489. Therefore, even though the licensing impost in Section 520.32 is described as a "fee" and was enacted pursuant to the police power, these factors are not dispositive of this appeal. Well settled case law establishes that Florida cannot require an out-of-state retail installment seller like Credicorp, which has no contacts with Florida other than by United States mail or common carrier, to obtain a license for the privilege of engaging in an exclusively interstate business. The licensing provisions of Section 520.32, as applied to Credicorp[6], therefore must fail.

The cases cited by the Department in its Brief do not compel a different conclusion. Instead, the cases are either (1) irrelevant as in the case of National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974), which did not involve the imposition of a license by a state on an out-of-state entity operating exclusively in interstate commerce and National Awareness Foundation v. Abrams, 50 F.3d 1159 (2d Cir. 1995), which did not involve the Commerce Clause at all; or (2) involve situations where the entity sought to be licensed or

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[6] Both in the proceedings below and before this Court, the Department has misapprehended the nature of Credicorp's constitutional challenge to the licensing provisions of the Retail Installment Sales Act. (Department's Brief at 17). Credicorp is not challenging the facial constitutionality of the licensing provisions, but rather the constitutionality of such provisions under the Commerce Clause "as applied" to Credicorp. Credicorp has never contended that the State cannot require the licensure of in-state retail installment sellers or of out-of-state retail installment sellers that have a physical presence in Florida. Thus, Credicorp is not required to meet the burden set forth in Reno v. Flores, ____ U.S. ____, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993), for facial challenges.

taxed was engaged in localized or intrastate commerce in addition to interstate commerce and therefore could be required to pay its fair share of the cost of local government. Cases in the latter category include Union Brokerage Co. v. Jensen, 322 U.S. 202, 64 S. Ct. 967, 88 L. Ed. 1227 (1944). In Union Brokerage, one of the issues presented was whether Minnesota could constitutionally deny access to its courts because Union, a foreign customs brokerage business, had not obtained a certificate of authority to do business in the state. 322. U.S. at 209-210. Because Union had established an office in Minnesota from which it did 90% of its business, 322 U.S. at 203, and bought its "materials and services from people in that State", 322 U.S. at 208, the Supreme Court concluded that Union had "localized its business" and therefore Minnesota could constitutionally require Union to obtain a certificate of authority under the Commerce Clause. 322 U.S. at 209-212.

Similarly, in Interstate Towing Ass'n, Inc. v. City of Cincinnati, 6 F.3d 1154 (6th Cir. 1993), the entities sought to be licensed were engaged in a localized towing business. There, the City of Cincinnati, by ordinance, required all tow trucks within the City limits or within a 25-mile radius of the City limits that towed vehicles from locations within the City to be licensed by the City. 6 F.3d at 1156. The Interstate Towing Association and several towing businesses that operated in and around Cincinnati challenged the ordinance as an unreasonable burden on interstate commerce. Unlike Credicorp, however, which has no contact with the

State of Florida except through the mail or by common carrier, the towing concerns in this case were rendering services to Cincinnati residents within the City limits. 6 F.3d at 1163-64. Moreover, unlike mail order solicitations which have been expressly held by the Supreme Court to constitute exclusively interstate commerce, National Bellas Hess, 386 U.S. at 759, towing services have consistently been deemed as "essentially local . . . . " Interstate Towing, 6 F.3d at 1163 n.8.

More importantly, the court in Interstate Towing distinguished the Robbins line of cases from the facts at issue there on the basis that the Robbins line of cases "... have held certain fees, licenses, and other local regulations impermissibly to burden interstate commerce [and] have all dealt with trades that consist solely or essentially of interstate carriage." Interstate Towing, 6 F.3d at 1164. Consequently, Interstate Towing is not applicable to the issue presented on appeal.

California v. Fairfax Family Fund, Inc., 47 Cal. Rptr. 812 (Cal. Dist. Ct. App. 1964), appeal dismissed, 382 U.S. 1, 86 S. Ct. 34, 15 L. Ed. 2d 6 (1965) and Silver v. Woolf, 694 F.2d 8 (2d Cir. 1982), cert. denied, 460 U.S. 1070, 103 S. Ct. 1525, 75 L. Ed. 2d 948 (1983), also involved the licensing of activities which were held to be "localized." In Fairfax Family Fund, the court upheld the application of a California licensing statute to an out-of-state corporation found to be conducting a small loan business in the state since the negotiations for the loans took place in California, a local credit investigation was secured in California,

and the collection of delinquent accounts necessarily occurred within the state. 47 Cal. Rptr. at 814-15. Likewise, in Silver, the court upheld the application of a Connecticut licensing statute to an out-of-state debt collection agency after concluding that the nature of debt collection is "almost entirely localized" since debt collectors employ abusive language and threats to collect debts and are generally seeking to collect on contracts entered into by companies which have a multitude of contacts with Connecticut. Silver, 694 F.2d at 12. While there is no question that Florida can regulate retail installment sellers doing business in this state, given Credicorp's lack of a substantial nexus with Florida and the nonintrusive nature of its business[7], it is clear that Credicorp's contacts with this state do not amount to the type of activity that could be deemed "localized".

California v. Thompson, 313 U.S. 109, 112, 61 S. Ct. 930, 85 L. Ed. 1219 (1941), is equally inapposite since the issue there involved the "constitutional authority of the state [of California] to regulate those who, within the state, aid or participate in a form of interstate commerce" which Congress had not chosen to regulate. In Thompson, a California statute required all transportation agents selling transportation over the public

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[7] Unlike debt collectors or securities brokers, Credicorp does not engage in person-to-person communications via the telephone. Rather, Florida residents simply receive a solicitation through the mail from Credicorp. Therefore, the danger of undue influence or harassment which often arises in person-to-person communications is not present. Consequently, there is no pressure on Florida residents to purchase products from Credicorp and they are free to discard the solicitations as they see fit.

highways of the state to obtain a license. 313 U.S. at 111. A local transportation broker was convicted of violating the statute after arranging a motor vehicle trip originating from Los Angeles without first obtaining a license. Because the case was "not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it," but instead only required licensure of brokers "engaged locally as transportation brokers," 313 U.S. at 114-15, the Supreme Court upheld the constitutionality of the statute under the Commerce Clause. 313 U.S. at 116.

The other principal case relied upon the Department is Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir.), cert. denied, 434 U.S. 880, 98 S. Ct. 236, 54 L. Ed. 2d 161 (1977). However, unlike the licensing requirement involved in this appeal, the statute at issue in Aldens did not require Aldens to submit a licensing application as a condition precedent to obtaining a license, nor did it exact a fixed-sum fee for the issuance of a license. Rather, Section 426.601 of the Wisconsin Consumer Act only required Aldens to file a notification with the state which was not dependent upon state approval. Moreover, the fee authorized by Section 426.202 of the Wisconsin Consumer Act was not the type of fixed-sum fee condemned by this Court in Olan Mills and Armstrong. Instead, the Wisconsin law established a sliding-scale fee based upon "the amounts financed on which the annual percentage rate exceeds the rates permitted by s. 138.05(1)(a) or (b), 1977 stats. . . . " W.S.A. 426.202(1)(a) (1988). Thus, Aldens is distinguishable from the

facts giving rise to this appeal.[8]

The Department next argues that even if the license fee imposed by Section 520.32(1) is a tax, the Commerce Clause analysis employed by the United States Supreme Court in Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972), is more analogous to this case than the analysis set forth by the Supreme Court in Quill Corp. v. North Dakota, 504 U.S. 298 (1992). (Department's Brief at 16). Credicorp respectfully disagrees, however, because the fee at issue in Evansville-Vanderburgh was a "user" fee leveled at airlines using airport facilities in Indiana and New Hampshire, and was designed for the express purpose of defraying the costs of airport construction and maintenance. Evansville-Vanderburgh, 405 U.S. at 709. As stated by the Court in Evansville-Vanderburgh, such fees have been upheld against a Commerce Clause attack where a charge is designed only to make the

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[8] Tousley v. North American Van Lines, Inc., 752 F.2d 96 (4th Cir. 1985), is similarly distinguishable since the challenged regulatory scheme only required registration in South Carolina, not licensure or the imposition of a fixed-sum fee. Tousley is further at odds with the instant appeal because the conduct at issue there occurred in South Carolina. 752 F.2d at 103. The same is true for Underhill Associates, Inc. v Bradshaw, 674 F.2d 293 (4th Cir. 1982), where the statutory scheme required registration of securities broker-dealers as opposed to licensure, and where the court found that the broker-dealers had "substantial contact" with the state by telephone, mail, advertising, credit checks, contacts with customers' employers and the maintenance of margin accounts. Aldens v. Packel, 379 F. Supp. 521 (M.D. Pa. 1974), is equally inapposite because the statute at issue there also did not require licensure. If it had, it would have been struck down by the court given the court's recognition that licensing requirements as applied to businesses engaged in purely interstate commerce are unconstitutional under the Commerce Clause. Packel, 379 F. Supp. at 529.

user of state-provided facilities pay a reasonable fee to help defray the costs of construction and maintenance. 405 U.S. at 714. Specifically, the Court concluded:

> [W]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, practical standard, they constitute no burden on interstate commerce. (citations omitted).

Evansville-Vanderburgh, 405 U.S. at 712-13. Although the Department freely concedes it is not providing special facilities to Credicorp, it nonetheless maintains that the user fee analysis applies because it is providing a regulatory benefit to the public and to the retail installment industry. (Department's Brief at 17).

The Evansville-Vanderburgh user fee analysis, however, is not appropriate in this case. With the exception of Center for Auto Safety, Inc. v. Athey, 37 F.3d 139 (4th Cir. 1994), which Credicorp submits was wrongly decided, the user fee cases involve fees charged by a state for the use of specific state facilities such as highways and airports within the state by the entity sought to be charged. See,e.g., Dixie Ohio Express Co. v. State Revenue Commission, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939); Clark v. Poor, 274 U.S. 554, 47 S. Ct. 702, 71 L. Ed. 1199 (1927).

In Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622 n.12, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981), the Supreme Court clarified that user fees "are purportedly assessed to reimburse the

State for costs incurred in providing specific quantifiable services, . . . [and further that the Court has] required a showing, based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered . . . . '" (citations omitted). Other than an unsupported, conclusory reference in its brief that the Department is providing a regulatory benefit to the public and the retail installment industry (Department's Brief at 17), there is no factual evidence in the record of this case which demonstrates that the fee assessed by Section 520.32 is designed to reimburse the State for providing "specific, quantifiable services" to Credicorp, or, and perhaps more importantly, that the Department even provides any "specific, quantifiable services" to Credicorp. There is certainly no evidence in the record that the fee charged is not "manifestly disproportionate to the services rendered." Clearly, where the fee is not designed to reimburse the state for the provision of specific, quantifiable services, the fee is not a "user" fee. Further, the $200 fee imposed here is not apportioned. It applies irrespective of whether a retail installment seller has 1000 locations in the State or none; whether the seller enters into retail installment transactions with thousands of Florida residents or one. In American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 289-92, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987), the Supreme Court distinguished the user fee in Evansville-Vanderburgh from the identification marker fee charged out-of-state motor vehicle carriers by the State of Pennsylvania where the fee did not

purport to approximate the fair cost or value of the use of Pennsylvania's roads. Because the fee at issue in this case is not designed to reimburse the state for the provision of specific, quantifiable services and is not apportioned to reflect a fair approximation of any use or benefit, the Evansville-Vanderburgh "user" fee analysis is inapplicable here.[9]

Rather, this Court should apply the modern approach for determining the validity of a state tax or fee. This approach focuses on the practical consequences of the assessment. American Trucking Associations, Inc. v. Scheiner, 483 U.S. at 294-95. In Scheiner, the Supreme Court noted:

> In 1977, while we recognized that we had invalidated privilege taxes on in-state activity deemed to be part of interstate commerce, we also noted that we had "moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology." Complete Auto Transit, Inc. v. Brady, 430 U.S. [274], at 281, 97 S. Ct. [1076], at 1080 [51 L.3d.2d 326 (1977)]. These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State,

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[9] Indeed, Justice Douglas impliedly made a distinction between a user fee and licensing fee in his dissent in Evansville-Vanderburgh where he noted:

> Of course interstate commerce can be made to pay its fair share of the cost of the local government whose protection it enjoys. But though a local resident can be made to pay taxes to support his community, he cannot be required to pay a fee for making a speech or exercising any other First Amendment right. Like prohibitions obtain when licensing is exacted for exercising constitutional rights. (citations omitted.)

Evansville-Vanderburgh, 405 U.S. at 726 (Douglas, J., dissenting).

> is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Scheiner, 483 U.S. at 295. Although prior decisions of the Supreme Court had analyzed the practical effect of a tax, the Supreme Court synthesized a four-prong test in Complete Auto Transit, Inc. v. Brady, 430 U.S. at 279, whereby a tax would pass constitutional muster under the Commerce Clause if the tax was (1) applied to an activity with a substantial nexus with the taxing State; (2) fairly apportioned; (3) nondiscriminatory against interstate commerce; and (4) fairly related to the services provided by the State.

An early form of this test was applied by the Supreme Court in National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967), where the State of Illinois Department of Revenue sought to require National Bellas Hess to collect and pay a use tax on all merchandise it sold to residents of Illinois. National was a mail order house with its principal place of business in North Kansas City, Missouri. Like Credicorp, National did not maintain any office, distribution house, warehouse, agents, salespersons, solicitors or any other representative to take orders, deliver merchandise or accept payments in Illinois. Id. at 754. Also like Credicorp, National did not own any real or personal property, had no telephone listing, and engaged in no radio, television, or newspaper advertising in Illinois. Id. Rather, National's sole contacts with Illinois were via the United States mail or common carrier. Id. National mailed catalogues twice a year to its active customers nationwide. Id. Similar to the instant case,

orders for merchandise were mailed by National's customers to National, where they were accepted at its Missouri office. Id.

Chapter 120, Section 439.2, Ill. Rev. Stat. (1965), required retailers maintaining a place of business in the state to collect and pay a use tax imposed by Illinois upon consumers who purchased the retailer's goods for use within the state. Pursuant to Chapter 120, Section 439.2, Ill. Rev. Stat. (1965), the term "[r]etailer maintaining a place of business in this State" included any retailer "[e]ngaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State."[10] Thus, National was considered a "retailer" for the purposes of collecting and paying the use tax.

After the Illinois Supreme Court affirmed a judgment ordering National to collect and pay the tax, National appealed. On appeal, National argued that the liabilities imposed by Illinois violated the Due Process Clause of the Fourteenth Amendment, and created an unconstitutional burden on interstate commerce. In reversing the judgment, the United States Supreme Court agreed, stating:

> [this] Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.

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[10] Illinois' retailer statute differs markedly from Florida's in that the Illinois statute makes no distinction between contracts entered into in the state and entered into outside the state. Cf. Section 520.31(10), Fla. Stat. (1991) (To fall within definition of "retail installment contract," contract must be entered into in Florida).

National Bellas Hess, 386 U.S. at 758. In support of its holding, the Court emphasized the existence of a bright-line distinction which had been drawn between mail order sellers with retail outlets, solicitors or property within a state, and those who merely communicate with state residents by mail or common carrier:

> In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the taxing authorities, is a valid one, and we decline to obliterate it. (footnote omitted).

Id. The Court further differentiated out-of-state mail order sellers with no local outlets or employees on the basis of services provided by the taxing state, the fourth prong of the Complete Auto test. Essentially, the Court concluded that because such mail order retailers were not receiving benefits from the taxing state, the state could not exact a tax. Id. at 758.

In the instant case, it is undisputed that Credicorp has no employees, agents or related independent contractors located in Florida (T.109). Further, Credicorp does not maintain any offices in Florida, nor does it own any real or personal property in this state. (T.109). Like the mail order house in National Bellas Hess, Credicorp has absolutely no contacts with the State of Florida other than through the United States mail or common carrier. (T.109-110). Thus, as in National Bellas Hess, the

connection between Credicorp's interstate business and the State of Florida is clearly insufficient to support the substantial nexus requirement under the Commerce Clause.

While National Bellas Hess was decided before Complete Auto, the same result obtained when the Supreme Court recently applied the Complete Auto test to an out-of-state mail order house in Quill Corporation v. North Dakota, 504 U.S. 298 (1992). In Quill, North Dakota sought to impose a use tax on Quill Corporation, an out-of-state mail order house with neither outlets nor sales representatives in the state. Although the trial court ruled in Quill's favor, finding the case indistinguishable from National Bellas Hess, the North Dakota Supreme Court reversed concluding that the Commerce Clause no longer mandated the physical presence nexus set forth in National Bellas Hess. In reversing the judgment of the North Dakota Supreme Court, the United States Supreme Court reaffirmed the use of the bright-line rule of National Bellas Hess under the Commerce Clause[11] and found that the regulation requiring Quill to collect use taxes placed an unconstitutional burden on interstate commerce due to Quill's lack of physical presence within the State. Id. at 309-19.

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[11] With respect to the Due Process aspect of National Bellas Hess, Quill overruled National Bellas Hess to the extent that a mail-order house need not have a physical presence in the state in order to permit the state to require the retailer to collect a use tax from its in-state customers. Quill, 504 U.S. at 308. Importantly, however, Quill did not overrule National Bellas Hess' physical presence rule for purposes of the substantial nexus requirement under the Commerce Clause. Id. at 317-18. Thus while a regulation may be permissible under the Due Process Clause, it can still fail under the Commerce Clause as an undue burden on interstate commerce. Id. at 312-13.

Florida courts have also invalidated regulations as applied to out-of-state entities where the tax failed to satisfy the substantial nexus test of Complete Auto. In City of Tampa v. Carolina Freight Carriers Corp., 529 So. 2d 324 (Fla. 2d DCA 1988), the City of Tampa attempted to apply an occupational license tax to Carolina Freight's transfer facility in Tampa. Carolina Freight was involved in the business of interstate transportation of general commodities. Although its corporate headquarters are located in North Carolina, it has 140 transfer facilities located nationwide -- one of which was located in Tampa. The license tax assessed against the company was a "flat tax" as opposed to one based on gross receipts. Significantly, the court found that the tax sought to be imposed on the Tampa transfer facility constituted an undue burden on interstate commerce under both this Court's reasoning in Armstrong and the United State Supreme Court's four-prong test in Complete Auto. Carolina Freight Carriers, 529 So.2d at 326-27.

Applying Complete Auto, the Second District concluded that the license tax failed the substantial nexus prong because Carolina Freight's transfer facility only handled inbound and outbound freight during its interstate movement and accordingly, the City could "not carve out of the interstate process the incident of loading and unloading freight at the Tampa facility as a separate and distinct aspect of the business on which to impose a tax." Carolina Freight Carriers, 529 So. 2d at 327. The license tax also failed the second prong of the test which requires the tax to be

fairly apportioned because a flat-sum tax is, by definition, not apportioned. Id. (relying on Armstrong, 118 So. 2d at 201-03).

The court further concluded that the tax failed the third prong of the test because it discriminated against interstate commerce. Specifically, the court stated that because the City imposes the occupational license tax as a prerequisite to doing business within its confines, local carriers are given an unfair advantage since Carolina Freight could be subject to occupational license taxes in many other jurisdictions. Id. The resultant burden of multiple taxation would make the cost of interstate commerce prohibitively expensive. Id. Finally, the court held that the license tax failed the fourth prong of the Complete Auto test because it was not fairly related to the services provided. Id. "Unlike a tax based on use or consumption, the City's flat-sum tax bears no relationship to Carolina Freight's presence or activities in Tampa." Id.

The same result is compelled here where there is even less of a nexus between Credicorp and the State of Florida than existed between the interstate freight carrier and the City of Tampa in Carolina Freight Carriers. As evidenced by the Recommended Order adopted by the Department in its Final Order, the Department erroneously believed that the nexus requirements imposed by the Due Process and the Commerce Clause are equivalent. (R.1365-66). Under this erroneous conception, if a mail order entity like Credicorp lacks a physical presence in the state but nonetheless satisfies the Due Process "minimum contacts" test, then the

corporation also meets the Commerce Clause "substantial nexus" test. This is precisely the argument the United States Supreme Court rejected in Quill. According to the United States Supreme Court, because the two tests are underscored by different constitutional concerns and policies, an out-of-state mail order house may have the requisite "minimum contacts" as required by the Due Process Clause, yet lack the "substantial nexus" with that state required by the Commerce Clause. Quill, 504 U.S. at 312-13. Accordingly, the Hearing Officer's conclusion, as adopted by the Department in its Final Order, that Credicorp's dealings with Floridians constitute sufficient "minimum contacts" to enable Florida to require licensure (R.1365-66), was erroneous as a matter of law under the Commerce Clause, and was correctly set aside by the District Court.

Notwithstanding, in addition to failing the "substantial nexus" prong of the test, which is sufficient grounds for striking the licensing provisions as applied, Quill, 504 U.S. at 314-15, the provisions also fail the second prong of the test because, as in Carolina Freight Carriers and Armstrong, the provisions impose a flat-sum tax which, by definition, is not apportioned. Carolina Freight Carriers, 529 So. 2d at 324. The third prong of the test is also not satisfied because the effect of the licensing provisions of Chapter 520 discriminates against interstate commerce. Credicorp does business in almost all fifty states (R.152-53). Local retail installment sellers would be given an impermissibly unfair advantage were this application of the law

allowed, since Credicorp would be subjected to duplicative fees and discordant regulations in every state if it were required to obtain a retail installment seller's license in every state in which it solicits orders.[12] The likelihood of impermissible multiple state regulation figured prominently in the United States Supreme Court's reasoning in National Bellas Hess, where the court recognized that if Illinois could impose such burdens, then so could:

> every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government." (footnotes omitted).
>
> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements.

National Bellas Hess, 386 U.S. at 759-60. The same rationale has been embraced by this Court. See Armstrong, 118 So. 2d at 199 (striking flat-sum license tax which was capable of duplication "by every community entered by the solicitors who are engaging in the interstate transaction.").

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[12] The welter of different regulations affecting retail installment sellers is vast, complex and nationwide. See, e.g., 205 Ill. Ann. Stat. chapter 205, section 660/1-660/17 (Smith-Hurd 1993); Ind. Code Ann. § 24-5-2-1, et. seq. (Burns 1991); Mass. Gen. Laws Ann. ch. 255D (West 1988); Mo. Rev. Stat. ch. 364 and 367 (1968 & Supp. 1995); Mont. Code Ann. § 31-1-201, et. seq. (1995); Nev. Rev. Stat. Ann. ch. 675 (Michie 1992); N.J. Stat. Ann. § 17:16C-1, et. seq. (West 1984); Vt. Stat. Ann. tit. 9, ch. 61, §§ 2401, et. seq. (1993 & Supp. 1995).

As demonstrated by the foregoing, Quill, Carolina Freight Carriers, National Bellas Hess and Armstrong require this Court to affirm the District Court's opinion setting aside the Department's Final Order to the extent that the Order unconstitutionally applies Chapter 520 to Credicorp. Like the out-of-state corporations in Quill and Carolina Freight Carriers, Credicorp has no physical presence in Florida and therefore lacks the substantial nexus with Florida that is necessary for the Department's application of the licensing provisions of Chapter 520 to pass constitutional muster.

The Department's reliance on Center for Auto Safety, Inc. v. Athey, 37 F.3d 139 (4th Cir. 1994), is misplaced for several reasons. First, the facts underlying the Athey case differ markedly from the facts in the instant appeal. In Athey, the Center for Auto Safety ("CAS"), a non-profit consumer advocacy organization incorporated in Washington D.C., challenged a sliding scale annual fee statute enacted by the state of Maryland which required all charities, in-state and out-of-state, soliciting contributions in Maryland to register with the state and pay an annual fee that varied in amount depending upon the level of nationwide contributions collected by the organization. 37 F.3d at 140-41. Therefore, unlike this case, the entity sought to be taxed in Athey was not a mail order seller like Credicorp for which a "safe harbor" has been created by the decisions of the United States Supreme Court. Quill, 504 U.S. at 315 (mail order sellers constitute a discrete realm of commercial activity that is free from interstate taxation). Further unlike this case, the record in

Athey demonstrated that the sliding scale fee was enacted to reimburse the state for the actual costs incurred for monitoring and administering charitable organizations in Maryland. Id. at 140. Significantly, the record in this appeal is devoid of any similar factual support for the licensing fee imposed by Section 520.32.

More importantly, however, the legal analysis employed by the court in Athey case is suspect. Specifically, the court applies the Evansville-Vanderburgh test to determine if the tax qualifies as a "user fee" or as a "tax" -- as opposed to the proper application of the test which is to determine if the tax as a "user" fee passes constitutional muster. Evansville-Vanderburgh, 405 U.S. at 716-17. The court appears to put the cart before the horse by determining that "because the Statute fulfills the three requirements of the Evansville-Vanderburgh standard, it is properly viewed as a user fee." Athey, 37 F.3d at 143 (footnote omitted). Clearly, had the court applied the Complete Auto test[13], the fee

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[13] Unlike the Fourth Circuit, the Third Circuit did apply the Complete Auto test to an annual license fee sought to be imposed on foreign sales corporations ("FSC") by the U.S. Virgin Islands in Polychrome International Corp. v. Krigger, 5 F.3d 1522 (3d Cir. 1993). Like the fee here, the fee in Polychrome International entitled the business to engage in its specified business. Id. at 1528 n.14. After Polychrome, a FSC, challenged the annual fee, in part, on Commerce Clause grounds, the Virgin Islands government moved for summary judgment which was granted by the trial court. Polychrome appealed. On appeal, the Third Circuit analyzed the constitutionality of the licensing fee under the Complete Auto standard, not the Evansville-Vanderburgh standard. Id. at 1535-40. In upholding the licensing fee, the court found a substantial nexus between the Virgin Islands and Polychrome's interstate operations since Polychrome was incorporated in the Virgin Islands, maintained an office and kept records there, and held its annual shareholder and director meetings there. Polychrome, 5 F.3d at 1536. Similar

could not have been sustained because of the nexus requirement, since CAS had no offices, employees or property in Maryland and only solicited contributions from Maryland residents through the mail. Athey, 37 F.3d at 143.

The user fee analysis aside, however, it appears that Athey was wrongly decided under limits imposed by the United States Constitution on a state's power to tax value earned outside of its borders. The sliding scale fee in Athey was based on the level of nationwide contributions. Athey, 37 F.3d at 140-41, 143. Therefore, it was not apportioned on the level of contributions solicited solely from Maryland residents. Recently, in Allied-Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768, 112 S. Ct. 2251, 2258-61, 119 L. Ed. 2d 533 (1992), the Supreme Court rejected New Jersey's attempt to tax value earned outside of her borders. In particular, the Court stated:

> The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. Ed. 744 (1954). The reason the Commerce Clause includes this limit is self-evident: in a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses would be subjected to severe multiple taxation.

Allied-Signal, 504 U.S. at 777-78. Although Allied-Signal involved a state's attempt to tax an apportioned amount of gain realized on the sale of corporate stock, the same basic constitutional

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connections are clearly missing in the instant case.

principles should have applied to Maryland's attempt to formulate a fee based upon contributions received from citizens of other states nationwide. Consequently, the fee imposed on the nationwide contributions of CAS should not have been upheld by the court in Athey.

Finally, the Department attempts to justify the licensing fee imposed by Section 520.32 based upon either the amount of "advance fees" Credicorp has received from Florida residents or the amount of revenue Credicorp has received nationwide either from sales or "advance fees." (Department's Brief at 14 and 19). It is abundantly clear, however, that these factors have never been dispositive of the constitutionality of a regulation or a tax under the Commerce Clause. For example, in Real Silk Hosiery, 268 U.S. at 334-35, although the Supreme Court noted that Real Silk had built up a very large business with $10,000,000 in annual sales (a significant amount of revenue for 1925), this factor did not prevent the Court from invalidating a $12.50 license fee (if on foot) or a $25.00 fee (if by vehicle). Similarly, in National Bellas Hess, although National's net sales in 1961 were approximately $60,000,000 and its accounts receivable were $15,500,000, the Court nonetheless held that Illinois could not impose a sales and use tax on National. National Bellas Hess, 386 U.S. at 760-61 (Fortas, J., dissenting); see also Quill, 504 U.S. at 302 (Quill's annual national sales exceeded $200,000,000 of which almost $1,000,000 were made to approximately 3,000 customers in North Dakota). Accordingly, the Department's argument is

without merit.

Because the licensing provisions of Section 520.32, Florida Statutes, constitute a flat-sum tax which cannot be constitutionally applied to Credicorp under the Commerce Clause given the discriminatory nature of the tax as applied and the lack of a substantial nexus between Florida and Credicorp's interstate operations, the District Court's opinion striking the licensing provisions must be affirmed.

B. EVEN IF THE LICENSING PROVISIONS OF SECTION 520.32, FLORIDA STATUTES (1991) COULD BE CONSTITUTIONALLY APPLIED TO CREDICORP, THE PROVISIONS ARE NOT APPLICABLE TO OUT-OF-STATE RETAIL INSTALLMENT SELLERS WHERE THE RETAIL INSTALLMENT CONTRACTS ARE NOT ENTERED INTO IN FLORIDA.

In accordance with the statutory scheme of the Florida Retail Installment Sales Act, a retail seller engaged in retail installment transactions must obtain a license from the state. Section 520.32(1), Florida Statutes (1991). As indicated by the Hearing Officer, the Act is intended to reach "contracts negotiated and entered into by mail or telephone." Section 520.36, Florida Statutes (1991) (R.1363-64). However, a reading of Section 520.31(10) *in para materia* with Section 520.32(1) requires that the contract reflecting the retail installment transaction <u>be entered into in Florida</u> before the state can require the retail installment seller to obtain a license. The unrebutted testimony at hearing demonstrates that Credicorp's contracts are not entered into in Florida, and hence Credicorp is not required to obtain a Florida license under Section 520.32(1).

It is a general maxim of contract law that a contract is considered entered into in the place where the last act necessary to create a contract occurs. Sesac, Inc. v. Green, 189 So. 2d 612 (Fla. 1966); Jemco, Inc. v. United Parcel Service, Inc., 400 So. 2d 499 (Fla. 3d DCA 1981). Because Credicorp's rules, regulations and order forms made "no mention of any contingency once the member completes, signs and sends in a form order for merchandise with the amount of money required" (R.1361), the Hearing Officer erroneously concluded that the "[o]rder forms filled out in Florida by Florida residents are surely among the 'instruments reflecting one or more retail installment transactions' to which Section 520.31(9) [sic], Florida Statutes (1991) refers." (R.1365). In arriving at this conclusion, the Hearing Officer completely disregarded the uncontroverted testimony at hearing that before Credicorp accepts an order received from a member, Credicorp must determine that the member had a current, valid membership; that the order was within the member's credit limit; that the member was not past due on his or her account; and that the item ordered was or would be available for shipment to fulfill the order. (T.115-16).

In addition, the Hearing Officer also disregarded that this method of offer and acceptance comports with the formation of a contract as recognized by the Florida Legislature through its adoption of the Uniform Commercial Code, Section 672.206, Florida Statutes, which provides:

> (1) Unless otherwise unambiguously indicated by the language or circumstances:
> (a) An offer to make a contract shall be construed as inviting acceptance in any manner

> and by any medium reasonable in the circumstances;
>
> (b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer. (Emphasis added).

Under Section 672.206, an order from a Credicorp member constitutes an offer which is accepted by Credicorp's prompt shipment of conforming merchandise.[14] Even though this method of contracting was borne out in testimony at the final hearing, the Hearing Officer completely disregarded this testimony and the directive of Section 672.206(1)(b) in concluding that "[a]n order does not require acceptance under Section 672.206(1)(b), Florida Statutes (1991), when it is itself acceptance under Section 672.206(1)(a), Florida Statutes (1991)." (R.1365). This conclusion is completely unsupported since there was absolutely no evidence that Credicorp's catalogue constituted an offer to contract as would be required if Section 672.206(1)(a) were applicable to the formation of contracts between Credicorp and its members. Common sense and the specific

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[14] The Aldens line of cases which the Department relies on also establish that contracts between a mail order business and a consumer in a different state are entered into in the state where the business is located. See Aldens, Inc. v. LaFollette, 552 F.2d 745, 748 and 750 n.9 (7th Cir. 1977) (contract made in Illinois where orders accepted and credit given by Aldens); Solevo v. Aldens, Inc., 395 F. Supp. 861, 865-65 (D. Conn. 1975) (same); Aldens, Inc. v. Packel, 379 F. Supp. 521, 526 (M.D. Pa. 1974) (same).

language of Section 672.206(1)(b) dictate that catalogue orders constitute offers, since no contract is formed if the retailer cannot ship the goods ordered due to unavailability, or does not ship the goods ordered due to problems with the member's account. Accordingly, the Hearing Officer's conclusion is both erroneous as a matter of law, and lacking in any evidentiary support.

In the instant action, there was no competent substantial evidence supporting the Hearing Officer's conclusion that Credicorp's contracts were entered into in Florida other than the lack of any formal designation in Credicorp's rules and regulations or catalogue that orders were not accepted until approved by Credicorp. In proceedings such as this, which are akin to license revocations, the Department has the burden to prove by "clear and convincing" evidence that the respondent committed the violations alleged in the administrative complaint. Evans Packing Company v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989). The fact that Credicorp's rules and regulations and order forms are silent as to the place of formation of the contract fails to rise to this level of proof, especially in the face of the unrebutted record testimony which supports a contrary conclusion.

Because the Department's conclusion that the contracts were entered into in Florida is not based upon competent substantial evidence, the conclusion that Credicorp violated Section 520.995(1)(a), Florida Statutes (1991), by failing to obtain a Florida retail installment seller's license under Section

520.32(1), Florida Statutes (1991), must be set aside. (R.1363-1367). Consequently, the District Court's finding that the Department did not abuse its discretion in determining that Credicorp entered into contracts with its members in Florida must be reversed.

CONCLUSION

Based upon the foregoing facts and authorities, Credicorp respectfully submits that the District Court properly determined that the Department's application of Florida's Retail Installment Sales Act to Credicorp violates the Commerce Clause of the United States Constitution. Alternatively, this Honorable Court should determine that the contracts entered into between Credicorp and its Florida customers were formed in Texas, and are not subject to regulation under Chapter 520, Florida Statutes. In either case, Credicorp respectfully requests that the decision of the District Court setting aside the Department's Final Order and vacating the penalties assessed under Chapter 520, Florida Statutes, should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of December, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished, **by Hand Delivery**, this 4th day of December, 1995, to the following:

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Appendix

CREDICORP, INCORPORATED, a Texas corporation, John Rheinfrank, individually and as President of Credicorp, Inc., and Steven W. Brown, individually and as Vice President of Credicorp, Inc., Appellants,

v.

STATE of Florida, DEPARTMENT OF BANKING AND FINANCE, Appellee.

No. 94-440.

District Court of Appeal of Florida, First District.

July 17, 1995.

Motion for Certification Granted Sept. 13, 1995.

The State Department of Banking and Finance issued final order requiring Texas-based catalog seller to cease and desist from activities covered by statute governing loan brokers and retail installment sellers, and imposed administrative fines. Appeal was taken. The District Court of Appeal, Kahn, J., held that: (1) licensing requirements of Retail Installment Sales Act could not be applied to seller without violating commerce clause; (2) seller was a retail installment seller under Act; and (3) terms of Loan Broker Act applied to seller.

Affirmed in part; reversed in part; question certified.

Allen, J., concurred in part and dissented in part and filed opinion.

1. Commerce ⇐61
Licenses ⇐7(1)

Statute requiring that retail seller engaging in retail installment transactions obtain license and pay nonrefundable application fee of $200, and renewal fee of $200, created flat-sum licensing tax which violated commerce clause when applied to seller that actively solicited and sold to state residents, but reached state only through mail and common carrier. U.S.C.A. Const. Art. 1, § 8, cl. 3; West's F.S.A. § 520.32(2).

2. Consumer Credit ⇐4

Catalog seller based in Texas would be deemed to have entered into retail installment sale contract in Florida, for purposes of statute regulating such contracts, even though seller claimed that contract was not formed until order forms filled out and mailed by Florida residents were accepted in Texas; statute defined "retail installment contract" to include instrument or instruments reflecting one or more retail installment transactions entered into in state, and definition was sufficiently broad to include order forms. West's F.S.A. § 520.31(10).

See publication Words and Phrases for other judicial constructions and definitions.

3. Consumer Credit ⇐4

Texas catalog seller was subject to Florida Act regulating loan brokers, even though seller claimed that it qualified for exception covering any retail installment sales company licensed by and subject to regulation or supervision of any agency of the United States or of Florida, and acting within scope of license, as it was subject to regulation by federal government (although none had been adopted) and because it could not be constitutionally subjected to regulation by agencies of Florida; statute provided seller with choice of either submitting to licensure as retail installment company, and thus qualifying for exemption from Loan Broker Act, or to not submit to licensure and comply with Florida loan brokering laws. West's F.S.A. § 687.14(4).

4. Consumer Credit ⇐4

Catalog seller located in Texas was subject to Florida statute regulating loan brokers, even though seller claimed that it was exempt because its credit facilitating activities were related only to sale of its merchandise; statute applied to any person arranging credit card or line of credit, which seller provided, and seller's arrangement for credit in connection with sale of its own goods was covered by statute unless second statute regulating retail installment sales was applicable, and seller claimed it was not subject to that statute. West's F.S.A. §§ 520.32, 687.0303, 687.14(4).

William E. Williams, Rex D. Ware, and Vikki R. Shirley of Huey, Guilday & Tucker, P.A., Tallahassee, for appellants.

Bridget L. Ryan, Asst. Gen. Counsel, Dept. of Banking & Finance, Tallahassee, for appellee.

KAHN, Judge.

This is an appeal from a final order entered by appellee, the Department of Banking and Finance (Department), on January 14, 1994, ordering Credicorp, Inc. (Credicorp) to cease and desist certain activities under chapters 520 and 687, Florida Statutes, and imposing administrative fines totalling $4,078,000 against appellants Credicorp, John Rheinfrank,[1] who served as its president until his departure from the company in the fall of 1992, and Steven Brown, who served as its vice-president, treasurer and secretary prior to becoming the company's president after Rheinfrank's departure. Appellants were specifically charged with violating the licensing provisions for retail installment contractors found in section 520.32,[2] Florida Statutes, and the loan broker provisions in section 687.141,[3] Florida Statutes. Appellants contend that (1) the licensing provisions for retail installment sellers in sections 520.30–.42 violate the Commerce Clause in the Constitution of the United States; (2) even if the licensing provisions do not violate the Commerce Clause, they do not apply to Credicorp because they do not cover retail installment contracts not entered into in Florida; (3) because Credicorp is not a loan broker as defined in section 687.14(4),[4] it did not violate the provisions of section 687.141 by collecting an advance fee from borrowers in exchange for its services as a loan broker; and (4) the penalty[5] imposed is unduly harsh. We affirm in part and reverse in part the Department's final order.

1. Mr. Rheinfrank died on October 25, 1993.

2. Section 520.32, Florida Statutes, provides in material part:

(1) A person may not engage in or transact the business of a retail seller engaging in retail installment transactions as defined in this part or operate a branch of such business without a license, except that a license is not required for a retail seller whose retail installment transactions are limited to the honoring of credit cards issued by dealers in oil and petroleum products licensed to do business in this state.

3. Section 687.141 provides:

No loan broker shall:

(1) Assess or collect an advance fee from a borrower to provide services as a loan broker.

(2) Make or use any false or misleading representations or omit any material fact in the offer or sale of the services of a loan broker or engage, directly or indirectly, in any act that operates or would operate as fraud or deception upon any person in connection with the offer or sale of the services of a loan broker, notwithstanding the absence of reliance by the buyer.

(3) Make or use any false or deceptive representation in its business dealings or to the department or conceal a material fact from the department.

4. Section 687.14(4) defines "loan broker" as:

[A]ny person, except any bank or savings and loan association, trust company, building and loan association, credit union, consumer finance company, retail installment sales company, securities broker-dealer, real estate broker or salesperson, attorney, federal Housing Administration approved lender, credit card company, installment loan licensee, mortgage broker or lender, or insurance company, provided that the person excepted is licensed by and subject to regulation or supervision of any agency of the United States or this state and is acting within the scope of the license; who:

(a) For or in expectation of consideration arranges or attempts to arrange or offers to fund a loan of money, a credit card, or a line of credit;

(b) For or in expectation of consideration assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit or related guarantee, enhancement, or collateral of any kind or nature;

(c) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers; or

(d) Holds himself out as a loan broker.

5. Penalties were imposed pursuant to section 687.143(3), Florida Statutes (1991), which provides:

(3) The department may impose and collect an administrative fine against any person found to have violated any provision of this act, any rule or order promulgated by the department, or any written agreement entered into with the department in any amount not to exceed $5,000 for each violation. All fines collected hereunder shall be deposited in the Division of Finance Regulatory Trust Fund.

I

Credicorp, originally incorporated under the name FAFCO in 1990, is a Texas corporation not authorized to do business in Florida. Credicorp operates a nationwide mail-order catalog business, and its only place of business is in Dallas, Texas. Credicorp has been operating in Florida since 1990, but none of its offices, employees, or independent contractors are located in Florida. Its services include providing discount coupons for retail establishments and privilege card benefits for discounts at hotels and car rental agencies. It advertises in Florida by sending solicitations to Florida residents. Certain solicitation forms placed in the record read:

TELEGRAM

Approval No.:

[account number specified]

Approval Expiration Date: [date specified]

[Name and address of targeted individual]

Congratulations [targeted individual],

You have been pre-approved for a Gold Card with a $10,000 line of credit.

Mail your $29.95 annual fee by check or money order by (specified date) along with this signed notice to activate your credit immediately.

Failure to do so will result in our reevaluation of your eligibility. Make check or money order payable to Credicorp Gold Card.

Sincerely,

Robert J. Armstrong

New Accounts Manager

Respond Today!

Recently the solicitations have included a 60-day money back guarantee and a disclaimer in small type indicating Credicorp's lack of affiliation with a financial institution. For the relevant time period, the above solicitation constituted the only document provided to a Florida consumer before the consumer responded by sending money to Credicorp. The solicitation does not list any services that Credicorp provides and does not indicate that the "Gold Card" is actually a catalog card that can only be used to purchase merchandise from Credicorp's catalogs.

As of June 1993, approximately 1,600,000 individuals nationwide had submitted membership applications and paid the $29.95 annual fee to Credicorp. On a single day, June 24, 1992, Florida residents sent Credicorp 243 applications, each accompanied by $29.95. A small sampling of Credicorp's membership records established that Credicorp solicited advance fees from at least 640 Florida residents. From a quick review of order forms in the record, it appears that Credicorp has received over one thousand merchandise orders from Florida residents.

After the customer submits a preapproved application and pays the membership fee, Credicorp mails a "fulfillment package" to the customer. This package was the first notice to the consumer that he or she has joined a catalog shopping club. The fulfillment package includes a "Home Values and Gifts" catalog to facilitate purchases from Credicorp. The customer may then purchase merchandise by submitting a completed and signed order form, contained in the catalog, to Credicorp. According to the price list and terms of Credicorp's catalog shopping program, two prices were available to a Credicorp customer—a cash price plus shipping and handling or a credit price with a 12% financing fee. A credit order requires a cash down payment. Any merchandise purchased on credit arrives with an installment coupon book for each item ordered. Upon receipt of an order form, Credicorp verifies the customer's current membership, the status of the member's account, and the availability of items ordered. After approval, Credicorp fills the order and ships the merchandise from Texas to the out-of-state customer via interstate carrier.

In July 1992, the Department advised Credicorp that it might be acting as a loan broker in violation of chapter 687, Florida Statutes. Subsequently, the Department advised Credicorp that it might also be an unlicensed retail installment seller in violation of chapter 520, Florida Statutes. Credicorp sent a letter in response, indicating its position that it does not do business in Florida and, even if it did, it does not fall within the definition of "loan broker" because it

arranges credit only between its customers and itself.

On January 13, 1993, the Department filed an administrative complaint charging Credicorp with violating various provisions of chapters 516, 520, 687 and 817, Florida Statutes. Before the final hearing, the Department withdrew its allegations that Credicorp violated chapters 516 and 817. The Department alleged Credicorp was a "loan broker" under chapter 687 and was violating section 687.141 by collecting an advance fee from borrowers in exchange for its services as a loan broker and making misleading representations or omissions in connection with the offer or sale of its services. The Department also alleged that Credicorp was an unlicensed retail installment seller in violation of section 520.32(1). Credicorp timely filed a response to the administrative complaint and requested a formal hearing.

On July 23, 1993, a DOAH hearing officer convened an administrative hearing. The Department called its lead investigator as its only witness and placed in the record numerous examples of solicitations, membership fulfillment packages, and order forms. On October 4, 1993, the hearing officer issued findings of fact and conclusions of law recommending that the Department order Credicorp to cease and desist all activities in violation of chapter 687, levy an administrative fine against Credicorp in the amount of $3,578,000 and assess additional fines of $250,000 against Rheinfrank and Brown in their capacity as officers of Credicorp under chapter 687. The Department's final order essentially adopted the hearing officer's preliminary statement, findings of fact and conclusions of law except that it rejected the hearing officer's finding that Credicorp's solicitations operated as a fraud or deception upon Florida residents. Although the hearing officer did not include a specific recommendation that Credicorp cease and desist any activities in violation of chapter 520, the Department so ordered. Credicorp timely appealed.

II

Application of Licensing Provisions to Interstate Commerce

The Department adopted the hearing officer's conclusion that "Florida's requirement that all retail installment sellers [6] doing business in Florida be licensed does not unduly burden interstate commerce and does not discriminate in any way against interstate commerce." As the reviewing court, however, we must reach our own determination concerning the constitutional validity of the licensing requirement as applied to a corporation with no physical presence in Florida.

[1] The Commerce Clause of the United States Constitution prohibits a state from imposing a use tax upon a nonresident business which solicits orders from the state's residents, but maintains no contact with the state except by mail or interstate carrier. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992); *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 758, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967) ("[this] Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with the customers in the State is by common carrier or the United States mail"). Florida courts have also applied this prohibition to the imposition of a license tax. *Olan Mills v. City of Tallahassee*, 100 So.2d 164 (Fla.1958), *cert. denied*, 359 U.S. 924, 79 S.Ct. 604, 3 L.Ed.2d 627 (1959) (where corporation was engaged in interstate commerce exclusively in taking photographs beyond the borders of the state, the city ordinance imposing license taxes on all photographers within the city was invalid as to corporation as attempt to place a direct tax on privilege of engaging in interstate commerce); *Armstrong v. City of Tampa*, 118 So.2d 195 (Fla.1960) (flat-sum license or privilege tax applied to Avon impeded flow of interstate commerce and therefore violated Commerce Clause because it was imposed on solicitors as a condition precedent to engaging in interstate commerce and was subject to being duplicated by every community into which Avon might enter); *City of Tampa v.*

6. Credicorp agrees that it is a retail installment seller.

Carolina Freight Carriers Corp., 529 So.2d 324 (Fla. 2d DCA 1988) (occupational license tax, as applied to Carolina Freight's facility, violates Commerce Clause). We are constrained by these cases and find the licensing provisions in chapter 520 may not be constitutionally applied to Credicorp because they constitute a flat-sum licensing tax which, according to the above cases, violates the Commerce Clause. If we were writing on a clean slate, we would hold otherwise. Although the licensing provision in section 520.32(2) requires each retail installment seller to pay a "non-refundable application fee not exceeding $200" and section 520.32(3) further requires payment of a "renewal fee not exceeding $200," the licensing provision is, in our view, not merely a tax. It is first and foremost state regulation of a matter of local concern through the police power.

The instant case is similar to *California v. Fairfax Family Fund, Inc.*, 235 Cal.App.2d 881, 47 Cal.Rptr. 812 (1964), *appeal dismissed*, 382 U.S. 1, 86 S.Ct. 34, 15 L.Ed.2d 6 (1965). In that case the court held that a Kentucky corporation engaged in the business of making small loans by mail to residents of California and 31 other states, which had loans of $3,500,000 outstanding to California residents and was increasing the amount of loans to them at a rate of about $90,000 per week, was doing business in California and, as a result, California had the power to license and regulate this business the same as local concerns. The defendant solicited its business by mailing printed material from Kentucky to persons in California. The borrower returned by mail a loan application and promissory note, and the defendant secured a California independent contractor to conduct a local credit investigation. After approval, the defendant mailed a check to the borrower, who made all payments by mail to the defendant's offices in Kentucky. The defendant maintained no offices in California, nor did any of its corporate officers reside in that state. Despite the amount of loans made to California residents, the defendant never secured a small loan license as required by California Financial Code section 24200 which provided: "No person shall engage in the business of making or negotiating, for himself, or another, loans of money, credit, goods, or things in action, in the amount or of the value of three hundred dollars ($300) or less, without first obtaining a license from the commissioner."

The California appeals court held that the Commerce Clause has not withdrawn from the state the power to regulate or control matters of local concern so long as Congress has not acted in the area,[7] the regulation is nondiscriminatory, and the regulation does not impose a burden on interstate commerce. 47 Cal.Rptr. at 813. Our review of the case law suggests the correctness of that proposition. *See California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219 (1941) (Court held that statute requiring every transportation agent to procure license from State Railroad Commission, pay license fee, and file bond does not violate Commerce Clause in absence of pertinent regulation by Congress and where regulation does not unnecessarily obstruct interstate commerce, affects matters of local concern which are in other respects within state regulatory power, and where regulation does not infringe on national interest in maintaining free flow of commerce and preserving uniformity in regulation of commerce); *Robertson v. California*, 328 U.S. 440, 447, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946) ("We are far beyond the time when, if ever, the word 'license' per se was a condemnation of state regulation of interstate business done within the state's borders. . . . For the commerce clause is not a guarantee of the right to import into the state whatever one may please, absent a prohibition by Congress, regardless of the effect of the importation upon the local community."). In areas affecting the health, life and safety of their citizens, the courts have allowed reasonable and nondiscriminatory regulation. *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (ban on imported baitfish did not violate Commerce Clause in that it served legitimate local purpose, i.e., protecting native fisheries from parasitic infection

7. The parties in the present case have advised the court that Congress has not acted to regulate or license retail installment sellers.

and adulteration by non-native species, that could not be served as well by available nondiscriminatory means); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960); *Operation Badlaw, Inc. v. Licking County Gen. Health Dist. Bd. of Health*, 866 F.Supp. 1059 (S.D.Ohio 1992), *aff'd*, 991 F.2d 796 (6th Cir. 1993); *Mercer v. Hemmings*, 170 So.2d 33 (Fla.1964) (statute requiring out-of-state CPAs to obtain certificate to practice in Florida did not violate Commerce Clause because of state's legitimate interest in maintaining standards of that profession).

Specifically, in *Taylor*, the Court held:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

477 U.S. at 151, 106 S.Ct. at 2451 (citation omitted).

The Supreme Court has recognized:

> [T]here are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court.

Thompson, 313 U.S. at 113, 61 S.Ct. at 932. The Court in *Thompson* went on to note:

> [F]raudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action. Unless some measure of local control is permissible, it must go largely unregulated.

313 U.S. at 114, 61 S.Ct. at 932. Justice Scalia, concurring in the judgment in *Quill Corp.*, wrote, "Even before *Bellas Hess*, we had held, correctly, I think, that state regulatory jurisdiction could be asserted on the basis of contacts with the State through the United States mail. *See Travelers Health Assn. v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 646–650, 70 S.Ct. 927, 928–931, 94 L.Ed. 1154 (1950) (Blue Sky laws)." 504 U.S. at 298, 112 S.Ct. at 1904.

In *Fairfax Family Fund*, the California appeals court noted that the small loan law, which serves primarily to protect citizens of California from fraudulent and unconscionable conduct of those in the lending business, constitutes a matter of local concern for the purpose of determining whether it violates the Commerce Clause insofar as a lender engaged in interstate commerce is concerned. 47 Cal.Rptr. at 813. The Commerce Clause does not preclude a state from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation is general in its scope, is not aimed at interstate or foreign commerce, and merely involves burdens incident to effective administration. 47 Cal.Rptr. at 815. The court noted that no question of discrimination existed because the statute applied to both interstate and intrastate lending agencies. The court explained that the degree of regulation is not disproportionate to the evils that exist if the lenders are left to their own devices without regulation by the state. *Id.* The licensing procedure imposes charges or expenses no larger in amount than are reasonably necessary to defray the administrative costs involved and could not, in any event, qualify as discriminatory or imposing undue restrictions on interstate commerce. *Id.* To deny the state the power to license and regulate this business as it does for local concerns engaging in the same business would, in ef-

fect, grant an immunity to which it is not entitled under the circumstances. *Id.* The court noted that "[a]s a practical matter, it would be next to impossible for the state to regulate the activities of this business without the license requirement." *Id.* Finally, the court observed that when the burdens imposed by local legislation become too great, Congress may legislate to secure uniformity or to protect the national interest as this is a legislative, not a judicial, function. *Id.*

The instant case is analogous to the above regulatory cases. The licensing provision in section 520.32 involves a local concern that the state has the power to regulate, that has not been regulated by Congress, and that does not discriminate against, or in any respect unnecessarily obstruct, interstate commerce. Moreover, the provision is designed to safeguard the people of Florida from deceitful practices and conduct such as that undertaken by Credicorp.

In our view, the Florida Legislature envisioned the licensing of retail installment sellers such as Credicorp. Section 520.36, entitled "Mail order and telephone sales," indicates the legislative intent to include within the licensing provisions retail installment contracts negotiated and entered into by mail or telephone.[8] We are nonetheless constrained to find that the licensing provision, with its flat tax rate, falls within controlling precedent and is therefore unconstitutional. Penalties assessed for a violation of chapter 520 must be set aside as must the finding of violation itself. In addition, we certify the following as a question of great public importance:

MAY FLORIDA IMPOSE A LICENSING REQUIREMENT AND ANNUAL FEE UPON A RETAIL INSTALLMENT SELLER THAT ACTIVELY SOLICITS AND SELLS TO FLORIDA RESIDENTS, BUT REACHES THIS STATE ONLY BY UNITED STATES MAIL AND COMMON CARRIER?

III

Retail Installment Seller

[2] Because we have elected to certify this issue as a question of great public importance, we reach Credicorp's additional contention that it may not be regulated under chapter 520 because it does not enter retail installment contracts in Florida.

The licensing requirement of section 520.32(1) is applied to "a retail seller engaging in retail installment transactions." A retail installment transaction means "a contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract . . . ." § 520.31(11), Fla. Stat. A " 'retail installment contract' or 'contract' means an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments." § 520.31(10), Fla.Stat. Credicorp argues that under section 520.31(10), a contract must be entered into in Florida before the state can require a license. In Credicorp's view, orders by Florida consumers are offers that Credicorp must accept, in Texas, before a contract is formed. Credicorp thus denies that any of its contracts are entered into in Florida. The Department obviously takes a contrary view, arguing that a contract of sale developed when the Florida consumer accepted Credicorp's offer to sell, as described in the terms, conditions, and prices in the Credicorp catalog, by submitting the completed and signed order form.

The hearing officer considered these arguments and found "[a] contract of sale can be formed by acceptance of an offer to sell as well as by acceptance of an offer to buy. *Peters v. E.O. Painter Fertilizer Co.*, 73 Fla. 1001, 75 So. 749 (1917)." Recommended Order, at 12. Significantly, however, he also

8. Section 520.36 provides:

Retail installment contracts negotiated and entered into by mail or telephone without personal solicitation by salesmen or other representatives of the seller, when a catalog of the seller or other printed solicitation of business which is distributed and made available generally to the public clearly sets forth the cash price and other terms of sales to be made through such medium, may be made as provided in this section.

found that "[o]rder forms filled out in Florida by Florida residents are surely among the 'instruments reflecting one or more retail installment transactions' to which Section 520.31(9), [sic] Florida Statutes (1991) refers." *Id.* The latter observation is astute and correct. The statutory scheme in question does not merely assume a meaning for "contract" or "retail installment contract." Rather, section 520.31(10) provides a specific definition. That definition of contract as "an instrument or instruments reflecting one or more retail installment transactions entered into in this state" may not strictly accord with commercial usage of the term. Nonetheless, "[w]here the legislature has used particular words to define a term, the courts do not have the authority to redefine it." *Baker v. State*, 636 So.2d 1342, 1343–1344 (Fla.1994); *see also Deehl v. Knox*, 414 So.2d 1089 (Fla. 3d DCA 1982) (statutes should be construed to reflect the common law, unless the legislature clearly indicates otherwise). Therefore, the Department, as the agency responsible for compliance with the statute, did not abuse its discretion in finding that Credicorp entered into "retail installment contracts" in this state.

IV

The Loan Broker Act

A

[3] We affirm the Department's ruling that appellants violated provisions of sections 687.141(1) and (3). Although appellants contend that Credicorp is not a loan broker as defined in section 687.14(4) [9], our review of the record and the statute leads to a contrary conclusion. Primarily, appellants contend that Credicorp fits the exception in the loan broker act for any "retail installment sales company ... licensed by and subject to regulation or supervision of any agency of the United States or this state and ... acting within the scope of the license." § 687.14(4), Fla.Stat. They urge that because the federal government does not license retail installment companies and because Florida cannot require Credicorp to be licensed in Florida without offending the Commerce Clause, Credicorp falls within the exception for retail installment companies. We disagree. Even if the state cannot require Credicorp to be licensed in Florida, Credicorp may not shelter itself under the definition in section 687.14(4), which excepts only retail installment sales companies licensed by any agency of the United States or Florida. Interstate concerns such as Credicorp that decide to pursue business in Florida have the choice of either voluntarily submitting to licensure, and thereby falling within the statutory exception, or complying with Florida's regulation that prohibits certain loan brokering acts. Credicorp chose not to voluntarily submit to licensure; therefore, it was required to play by the rules found in chapter 687. The loan broker provisions, sections 687.14–687.148, viewed in light of the cases discussed in section II, *supra*, constitute a permissible exercise of Florida's police power.

We do not view Florida's regulatory scheme as the type of overtly protectionist legislation that has been rightly condemned under the Commerce Clause. An example of such may be found in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980). That case presents a classic example of what the Court concluded to be "parochial legislation" in the sense that it "overtly prevents foreign enterprises from competing in local markets." 447 U.S. at 27, 100 S.Ct. at 2009. The statute in question in *Lewis*, section 659.141(1), Florida Statutes, prohibited an out-of-state bank holding company from owning or controlling a Florida business that sells investment advisory services to any customer. This statute was apparently passed at the prompting of the Florida Bankers Association and certain individual banks, once they became aware of the prospect of Bankers Trust (BTIM) opening an investment advisory service in Palm Beach County. Under the terms of the statute, Bankers Trust, which principally conducted its business outside Florida, could not acquire, own, or control, directly or indirectly, any Florida bank or trust company where the business of banking or trust business or functions are conducted, or from which such business furnishes invest-

9. *Supra*, note 4.

ment advisory services. According to the complaint filed in *Lewis*, that particular statute, when read in conjunction with section 660.10, Florida Statutes, prohibiting any corporation, other than a state chartered bank and trust company or a national banking association located in Florida from performing certain trust or fiduciary functions, prohibited Bankers Trust from establishing a subsidiary trust company having a national bank charter or a Florida state charter that would engage exclusively in one or more of the functions regulated by section 660.10, Florida Statutes. Thus, the subsidiary, BT Investment Managers, and its prospective parent, Bankers Trust, were completely locked out of the market in Florida. The record in the case also showed that, but for the offending Florida statute, the Federal Reserve Board would have permitted Bankers Trust to engage in the proposed business.

In the present case, retail installment companies that submit to Florida licensure are not subject to the loan broker provisions. Nonetheless, it would require a great stretch to conclude that the statute acts as a barrier specifically to out-of-state firms, or that in-state retail installment sellers have a significant competitive advantage that may not be overcome by interstate businesses. In *Lewis*, the court rightfully concluded that the Florida scheme resulted in "outright prohibition of entry, rather than some intermediate form of regulation (as) the only effective method of protecting against the presumed evils . . ." 447 U.S. at 43, 100 S.Ct. at 2019. The statute presently under review regulates, rather than prohibits, loan brokering, and Credicorp raises no argument that it is unable to meet one of the exceptions of section 687.14, only that it may not constitutionally be required to meet one of the exceptions.

Our research has located, and we now distinguish, other cases in which the state legislation at issue had a clear protectionist motivation. *E.g., National Meat Association v. Deukmejian*, 743 F.2d 656, 657 (9th Cir. 1984) ("the purpose of the law was to promote the California beef industry"); *Miller v. Publicker Industries, Inc.*, 457 So.2d 1374 (Fla.1984) (tax preference afforded to domestic gasohol had the practical effect of putting an importer of gasohol out of business as far as the Florida market was concerned); *Delta AirLines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla.1984) (tax credit for Florida based airlines discriminates against interstate commerce because the corporate tax credit provides a direct commercial advantage to Florida based common carriers over non-Florida based carriers).

We are not persuaded that a different result is required by *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), a case relied upon heavily by the dissenting opinion, but not cited at all by Credicorp in any of its briefs. In *Hughes*, a commercial minnow dealer challenged an Oklahoma statute that prohibited transporting or shipping outside the state of Oklahoma for sale minnows seined or procured from waters within Oklahoma. *Hughes* adopted the view that had been previously put forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970):

> "Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

441 U.S. at 331, 99 S.Ct. at 1733. The statute involved in *Hughes* went far beyond mere discrimination against interstate commerce; rather, it "overtly block[ed] the flow of interstate commerce at [the] State's borders." 441 U.S. at 337, 99 S.Ct. at 1737, quoting, *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). In an effort to protect its natural resources, Oklahoma chose the method that most overtly discriminated against interstate commerce. Condemning this "most discriminatory means," the Supreme Court noted the existence of "nondiscriminatory alternatives" ad-

equate to fulfill Oklahoma's legitimate local purpose. 441 U.S. at 338, 99 S.Ct. at 1737. By using the plural term "alternatives," it appears the Supreme Court will allow a state some discretion to fulfill a legitimate local purpose where it is demonstrated that the state has not elected to utilize the most discriminatory means, which is overt blockage of the flow of interstate commerce.

Under our holding in this case, interstate firms may either voluntarily comply with the Florida state licensing provisions or may comply with the substantive regulatory provisions. This case is, thus, different from those cases in which the out-of-state company found itself, as the result of protectionist legislation, unable, by any means, to obtain the same treatment afforded to domestic companies.

B

[4] Credicorp next argues that it does not fall within the definition of a "loan broker" contained in section 687.14(4). A "loan broker" is:

> [A]ny person, ... who: (a) ... arranges or attempts to arrange or offers to fund a loan of money, a credit card, or a line of credit; (b) ... assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit, or related guarantee, enhancement, or collateral of any kind or nature; (c) acts for or on behalf of a loan broker for the purpose of soliciting borrowers; or (d) holds himself out as a loan broker.

§ 687.14(4), Fla.Stat. The Department did not show that Credicorp arranges loans of money. We must thus determine whether Credicorp qualifies as a loan broker under any of the remaining sections of the statutory definition. In particular, a loan broker also includes any person who arranges or attempts to arrange a line of credit or a credit card, or who holds himself out as a loan broker.

Credicorp denies any involvement in lines of credit, as that term is defined in section 687.0303.[10] Appellants contend that the statutory definition of line of credit does not include the commercial definition of the phrase, which actually describes what Credicorp does: the extension of credit by a retailer for use by the consumer in purchasing that retailer's goods. We do not read the definition so narrowly, nor do we believe such a construction fits the loan broker provisions when read *in pari materia*. As previously noted, the statute excepts from its provisions licensed retail installment sales companies which, like Credicorp, extend only credit for sale of their own merchandise. If such sellers were not otherwise under the regulatory ambit, no need would exist for an exception. In our estimation, Credicorp's installment sales practices are the functional equivalent of advancing money to a debtor. Moreover, we are convinced the Department did not abuse its discretion by finding that Credicorp held itself out as a loan broker by offering a line of credit and a credit card.

The solicitation sent to Florida consumers proclaimed, "You have been pre-approved for a *Gold Card* with a $10,000 *line of credit.*" The term "credit card" is not defined in chapter 687. *Black's Law Dictionary*, however, defines "credit card" as:

> Any card, plate or other like credit device existing for the purpose of obtaining money, property, labor or services on credit. The term does not include a note, check, draft, money order or other like negotiable instrument.

Black's Law Dictionary 367 (6th ed.1990). Credicorp's Gold Card falls within that definition because it exists for the purpose of obtaining property, i.e., merchandise from Credicorp's catalog on credit. Credicorp itself refers to the Gold Card as a credit card in its Members Only Finance Guide: "All credit card purchases carry a finance charge on the amount financed at the Annual Per-

10. Section 687.0303 provides:

> (1) The term "line of credit," whenever used in this chapter, means an arrangement under which one or more loans or advances of money may be made available to a debtor in one transaction or a series of related transactions.
>
> (2) The Legislature hereby declares that, as a matter of law, "line of credit," as such term is defined in this section, is deemed to have been included in and governed by the provisions of this chapter as it existed prior to, on and subsequent to July 1, 1979.

centage rate of just 12%." In addition, the order forms Credicorp sends to members includes the following language: "Please enter the following items to be charged to my Gold Credit Card." The Credicorp Rules and Regulations pamphlet also makes repeated reference to use of the Gold Card to purchase merchandise.

The initial solicitation portrays Credicorp as a loan broker by stating without qualification that the targeted consumer has been pre-approved for a "Gold Card with a $10,000 line of credit." Nothing in this mailing informs the consumer that this line of credit has any restrictions or is not really a line of credit as defined in section 687.0303, Florida Statutes. Similarly, in its solicitations, Credicorp fails to mention that the Gold Card is actually a catalog card and cannot be used to purchase services or merchandise from other retailers. We reject Credicorp's argument that it is protected because the line of credit and credit card offers were in truth neither.

V

Finally, the award of penalties was within the permissible range as found in section 687.143 and is supported by competent substantial evidence. The Department therefore acted within its discretion and this court may not overturn the penalty. *See Florida Real Estate Comm'n v. Webb*, 367 So.2d 201 (Fla. 1978); *Arpayoglou v. Department of Prof. Reg.*, 603 So.2d 8 (Fla. 1st DCA 1992).

AFFIRMED in part; REVERSED in part; question certified.

BARFIELD, J., concurs.

ALLEN, J., concurs in part & dissents in part with written opinion.

ALLEN, Judge, concurring in part and dissenting in part.

Because there is no substantial nexus for Commerce Clause purposes under the circumstances presented here, I agree with the majority that the finding and penalty with respect to the section 520.32(1), Florida Statutes, license tax must be set aside. I respectfully disagree, however, with the majority's conclusion that the loan broker statutes may be applied to Credicorp without offending the Commerce Clause.

The Commerce Clause grants the congress power "[t]o regulate Commerce ... among the several States." Although the provision speaks in terms of a power granted to the congress, it has been recognized that it also limits the power of the states to erect barriers to interstate trade. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 623, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). This limitation, however, is not absolute. In the absence of conflicting federal legislation, the states may exercise their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected. *See, e.g., Lewis*, 447 U.S. at 36, 100 S.Ct. at 2015; *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.Ed.2d 664 (1978). Yet, notwithstanding the importance of the state interest involved, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Lewis*, 447 U.S. at 36, 100 S.Ct. at 2015, *quoting Philadelphia v. New Jersey*, 437 U.S. at 626–627, 98 S.Ct. at 2537; *see also Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Accordingly, a virtually *per se* rule of invalidity has been applied where outright protectionism is involved. *See, e.g., Lewis*, 447 U.S. at 36, 100 S.Ct. at 2015; *Philadelphia v. New Jersey*, 437 U.S. at 624, 98 S.Ct. at 2535. But the prohibition against discrimination is not limited to obviously protectionist legislation. Indeed, discrimination against interstate commerce is impermissible even though the discrimination is not apparent from a mere reading of the legislation, and even though the legislation may not have been enacted for purposes of economic protection. *See Hunt*, 432 U.S. at 352–353, 97 S.Ct. at 2446. It is enough that the legislation mere-

ly discriminates against interstate commerce "in practical effect." *Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736.

A three-part test has been applied to determine whether a state legislative enactment impermissibly discriminates against interstate commerce. Under that test, we must inquire: (1) whether the challenged statute discriminates against interstate commerce, either on its face or in practical effect; (2) whether the statute serves a legitimate state purpose; and, if so, (3) whether alternative means could promote this purpose as well without discriminating against interstate commerce. *See Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736; *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. Even assuming that there is a legitimate state purpose for including retail installment sellers within the coverage of Florida's loan broker statutes, an analysis under the first and third parts of the foregoing test reveals that the statutes may not be applied to out-of-state retail installment sellers such as Credicorp to the exclusion of licensed in-state retail installment sellers.

As construed by the majority, the loan broker statutes treat out-of-state retail installment sellers not subject to the section 520.32(1) license tax differently from local retail installment sellers who are subject to the 520.32(1) tax. Out-of-state retail installment sellers such as Credicorp are subject to the statutes, but in-state licensed retail installment sellers are exempt. *See* § 687.14(4), Fla.Stat. This unequal application results in harmful discrimination against out-of-state businesses such as Credicorp because it forces them to make a choice: they must either pay the unconstitutional 520.32(1) license tax, or, pursuant to the prohibition of section 687.141(1), Florida Statutes, they must refrain from a practice which is permitted for local, licensed retail installment sellers, the charging of an advance fee for the extension of credit. *See* § 687.141(1), Fla.Stat.

In light of the discriminatory effect of the loan broker statutes, a further inquiry must be made under the test set forth above: whether alternative means could promote the state regulatory purpose as well without discriminating against interstate commerce. The answer seems fairly obvious. The discriminatory effect could easily be removed by making the loan broker statutes applicable to all retail installment sellers. Indeed, if the legislature has determined that a legitimate state purpose is served by making the loan broker statutes applicable to some retail installment sellers, I see no valid reason for failing to make them applicable to all retail installment sellers, and none has been suggested by the appellee.

Because the loan broker statutes, as construed by the majority, discriminate against interstate commerce, and because this discrimination could easily be eliminated, the statutes violate the Commerce Clause to the extent that they are applied to unlicensed out-of-state retail installment sellers such as Credicorp. Accordingly, I would hold that the loan broker statutes may not be applied to such businesses.

The majority does not suggest that the loan broker statutes are being applied equally to all retail installment sellers, and the majority acknowledges that out-of-state businesses such as Credicorp must make the choice described above. But the majority suggests that such treatment of out-of-state businesses is acceptable for three reasons.

First, the majority says that the loan broker statutes do not violate the Commerce Clause because they do not amount to "overtly protectionist legislation." I agree that the loan broker statutes are not overtly protectionist legislation such as the legislation at issue in the cases cited in the majority opinion. But, under the test enunciated in cases such as *Hughes v. Oklahoma* and *Pike v. Bruce Church*, that is not the end of the inquiry. As explained above, even legislation that is not overtly protectionist violates the Commerce Clause if it has the effect of unnecessarily discriminating against interstate commerce.

Second, the majority says that the loan broker statutes are permissible because they regulate, rather than prohibit, loan brokering. But I know of no exclusion from Commerce Clause scrutiny which must or should be accorded to legislation simply because it fails to absolutely prohibit an economic activity. Indeed, there are numerous examples of state statutes held to be violative of the

Commerce Clause even though they did not have the effect of prohibiting economic activity. *See, e.g., Hunt*, 432 U.S. at 333, 97 S.Ct. at 2434; *Pike*, 397 U.S. at 137, 90 S.Ct. at 844.

Finally, the majority says that the loan broker statutes meet constitutional scrutiny because Credicorp could pay the section 520.32(1) license tax and be excepted from the loan broker statutes, thereby overcoming any significant competitive advantage that in-state retail installment sellers might have as a result of the loan broker statutes. I know of no other authority for the proposition that states may discriminate against interstate commerce through regulatory legislation so long as the burden of that discrimination may be overcome through payments by affected out-of-state businesses into the state's treasury. I doubt that such authority existed before today. And the majority's holding in this regard seems particularly enigmatic in light of the fact that the suggested payment into the state treasury would be for a license tax which, according to the same majority, may not lawfully be assessed against Credicorp because of the prohibition of—the Commerce Clause.

I would reverse the order in its entirety.

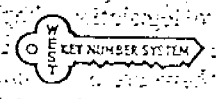
ON MOTION FOR CERTIFICATION

KAHN, Judge.

We grant in part appellant's motion for certification and certify the following as a second question of great public importance passed upon by this decision:

MAY FLORIDA CONSTITUTIONALLY APPLY THE LOAN BROKER ACT, SECTION 687.14-687.148, FLORIDA STATUTES, TO AN OUT-OF-STATE RETAIL INSTALLMENT SELLER WHICH, UNDER THE COMMERCE CLAUSE, MAY NOT BE COMPELLED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY UNDER SECTION 520.32, FLORIDA STATUTES?

BARFIELD and ALLEN, JJ., concur.



Rolando GARCIA, Appellant,

v.

STATE of Florida, Appellee.

No. 93-02918.

District Court of Appeal of Florida, Second District.

July 19, 1995.

Rehearing Denied Aug. 18, 1995.

Defendant was convicted in the Circuit Court, Sarasota County, James S. Parker, J., of committing lewd and lascivious act upon child under age of 16 years. Defendant appealed. The District Court of Appeal, Lazzara, J., held that trial court failed to make proper findings of reliability prior to admitting hearsay statements of child victim into evidence at trial.

Reversed and remanded with directions.

1. Infants ⇐20

For hearsay statement to be admissible under child sexual abuse exception to hearsay rule: (1) source of information through which statement was reported must indicate trustworthiness, and (2) time, content, and circumstances of statement must reflect that statement provides sufficient safeguards of reliability. West's F.S.A. § 90.803(23).

2. Criminal Law ⇐695½

In determining whether hearsay testimony is admissible under child sexual abuse exception, trial court must set forth specific reasons upon which it relies and may not merely recite statutory requirements relating to reliability. West's F.S.A. § 90.803(23).

3. Criminal Law ⇐662.8

Trial court's failure to make specific findings of reliability in determining whether hearsay testimony is admissible under child

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

CREDICORP, INCORPORATED, a Texas Corporation, John Rheinfrank, individually and as President of Credicorp, Inc., Stevan W. Brown, individually and as Vice Presicent of Credicorp, Inc.,

CASE NO. 94-00440
DOAH CASE NO. 93-0911

Respondents/Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Petitioner/Appellee.

_____/

APPELLANTS' MOTION FOR REHEARING AND REHEARING EN BANC

Appellants, Credicorp Incorporated, John Rheinfrank, individually and as President of Credicorp, Inc., and Stevan W. Brown, individually and as Vice President of Credicorp, Inc. (hereinafter referred to collectively as "Credicorp" or "Appellants"), by and through their undersigned counsel, hereby move the Court pursuant to Rules 9.330 and 9.331(d), Florida Rules of Appellate Procedure, for rehearing and rehearing en banc of this Court's Opinion filed July 17, 1995, and in support thereof states the following:

I. MOTION FOR REHEARING

Credicorp seeks rehearing of Part IV[1] of this Court's Opinion involving the Court's application of Section 687.141, Fla. Stat. (the "Loan Broker Act"), to Credicorp on the basis that the Court overlooked or misapprehended the following points of law and/or fact:

> (A) The penal nature of Chapter 687, Fla. Stat., as applied to Credicorp requires that that statute be strictly construed, and when such a strict construction is properly applied, in light of the record in this proceeding, Chapter 687 is not applicable to Credicorp;
>
> (B) In light of this Court's holding that the licensing requirements of Section 520.32, Fla. Stat., as applied to Credicorp, violate the Commerce Clause of the United States Constitution, Chapter 687 cannot be constitutionally applied to Credicorp without also violating Commerce Clause restrictions.

A. CHAPTER 687, WHEN STRICTLY CONSTRUED, IS INAPPLICABLE TO CREDICORP.

On July 17, 1995, this Court affirmed in part and reversed in part a Final Order of the State of Florida, Department of Banking and Finance, which found that Appellants had violated the licensing provisions for retail installment sellers found in Section 520.32, Fla. Stat., and the loan broker provisions of Section 687.141, Fla. Stat. This Court found application of the licensing provisions for retail installment sellers in Sections 520.30-.42 violative of the Commerce Clause of the United States Constitution, but upheld the application of the loan broker provisions of Section 687.141 to Appellants, together with fines for those violations amounting to $3,700,000.00.

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[1] Mislabeled as a second Part "III" in the Opinion.

Because of the fine imposed against Appellant, there can be little doubt that Chapter 687 is "penal" in nature. Because of the penal nature of the statute, it ". . . must be strictly construed, and, if there are any ambiguities within it, they must be construed in favor of [a respondent]." School Board of Pinellas County v. Noble, 384 So. 2d 205, 206 (Fla. 1st DCA 1980). Further, this Court has held that in applying the rule of strict construction, no construction of a statute is justified ". . . which includes within the ambit of the statute's proscription conduct not clearly included therein. Nor does it justify a construction that would deny [a respondent] the right to know in advance from a reading of the language what conduct is proscribed by the Legislature." Lester v. Department of Professional and Occupations Regulations, 348 So. 2d 923, 925 Fla. 1st DCA 1977). Finally, the Florida Supreme Court in City of Miami Beach v. Gaulbut, 626 So. 2d 192, 193-194 (Fla. 1993), held that ". . . [w]hen a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes." (Emphasis added).

As noted in its Opinion, this Court found that the Department charged that Credicorp was ". . . a 'loan broker' under Chapter 687 and was violating Section 687.141 by collecting an advance fee from borrowers in exchange for its services as a loan broker and making misleading misrepresentations or omissions in connection with the offer or sale of its services." (Slip op. at 7).

The term "loan broker" is defined in Section 687.14(4) as:

> [A]ny person, . . . who: (a) . . . arranges or attempts to arrange or offers to fund a loan of money, a credit card, or a line of credit; (b) . . . assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit, or related guarantee, enhancement, or collateral of any kind or nature; (c) acts for or on behalf of a loan broker for the purpose of soliciting borrowers; or (d) holds himself out as a loan broker.

Section 687.0303(1) defines the term "line of credit" as ". . . an arrangement under which one or more loans or advances of money may be made available to a debtor in one transaction or a series of related transactions." (Emphasis added). Finally, Section 687.14(1), Fla. Stat., defines "advance fee" to mean ". . . any consideration which is assessed or collected, prior to the closing of a loan, by a loan broker." (Emphasis added).

In its Opinion, this Court noted that the Department's Final Order ". . . rejected the Hearing Officer's finding that Credicorp's solicitations operated as a fraud or deception upon Florida residents." (Slip op. at 8). Significantly, this Court also found that ". . . the Department did not show that Credicorp arranges loans of money." (Slip op. at 24). It is respectfully submitted that this Court overlooked the undisputed testimony of the Department's only witness at the final hearing that Credicorp did not offer to its customers a "line of credit" as that term is defined in Section 687.0303(1), Fla. Stat. (T. 61). Further, since Credicorp, by the Department's own admission, does not "make loans or advances of money" to its customers, the $29.95 annual membership fee charged by Credicorp cannot constitute an "advance fee" as defined in Section 687.14(1), Fla. Stat. To qualify as an "advance fee" a payment must be assessed or collected "prior to the closing of a loan, ..." Section 687.14(1), Fla. Stat.

As noted by this Court, Chapter 687 contains no definition of the term "credit card." (Slip. op. at 25). The Court's opinion, however, indicates that Credicorp ". . . extend[s] only credit for sale of [its] own merchandise." (Slip. op. at 25).

In light of the absence of a statutory definition of "credit card," the Court's opinion references the definition of that term contained in Blacks Law Dictionary (6th ed. 1990), which cites neither case nor statutory law for its definition. (Slip. op. at 25). From that definition, the Court concluded that Credicorp's Gold Card is a "credit card" because ". . . it exists for the purpose of obtaining property. . . ." (Slip op. at 25). In making this finding, the Court overlooked the only evidence on this point contained in the record. The uncontradicted testimony before the Hearing Officer was that the Credicorp Gold Card was used only as a reminder of the customer's membership number; it was not used to either purchase goods from Credicorp or any other retail seller, or to secure loans or cash advances. (T. 113-114).

Under the rule requiring strict construction of penal statutes, it is respectfully submitted that the Department failed to show that Credicorp is a "loan broker" within the meaning of Chapter 687. Although this Court finds that Credicorp's installment sales practices are the "functional equivalent" of advancing money to a debtor (Slip. op. at 25), the rule of strict construction of penal statutes does not allow for establishing a violation of a penal statute on the basis of a "functional equivalent" of a clearly defined statutory term. This Court's opinion clearly recognizes that Credicorp is a "retail installment sales company."

(Slip. op. at 25). Since a "retail installment transaction" as defined in Section 520.31, Fla. Stat. is a sale on credit and not a "loan," such a transaction cannot serve as the basis for a violation of Chapter 687.

The Court has also overlooked the fact that this proceeding arose in an enforcement context ". . . when the conduct to be assessed is past, beyond the actor's power to conform it to agency standards announced prospectively. . . ." Bowling v. Department of Insurance, 394 So. 2d 165, 172 (Fla. 1st DCA 1981). No fair reading of Chapter 687 would have placed Credicorp on notice that what is clearly a "retail installment transaction" under Chapter 520 would also be construed as a "loan" under Chapter 687. It is respectfully submitted that a strict construction of the pertinent statutes does not allow such an interpretation here.

Credicorp has never contended that it does not offer a "line of credit." It is clear, however, that the "line of credit" offered by Credicorp does not fall within the statutory definition contained in Section 687.0303(1) in that it does not involve any "loan" or "advance of money." The undisputed testimony below established that Credicorp does not loan or advance money to its customers. (T. 61). It is equally important to note both that no Credicorp customers testified to the contrary, and that, as this Court noted, ". . . [t]he Department's final order rejected the hearing officer's finding that Credicorp's solicitations operated as a fraud or deception upon Florida residents." (Slip op. at 8).

In short, the undisputed facts of record clearly establish that Credicorp did not "loan money" nor offer to its customers a "line of credit" as that term is defined in Chapter 687.

Further, since the term "credit card" is not defined in Chapter 687, Credicorp, under the rule requiring strict construction of penal statutes, could not have been on notice that a membership identification card used only in connection with retail installment sales of its own merchandise would have subjected it to regulation under Chapter 687. Additionally, because Credicorp did not, in fact, perform acts qualifying it as a "loan broker" under Chapter 687, it naturally follows that Credicorp did not "hold itself out" as a loan broker. There is no evidence that Credicorp represented to its customers that it offered loans, a line of credit as defined in Chapter 687, or a "credit card" in any of its solicitations. In fact, the term "credit card" is not contained in any solicitation mailed to Florida customers by Credicorp.

The undisputed facts recited above, together with the proper standard of statutory construction, require a conclusion that Chapter 687 is not applicable to Credicorp. It is, therefore, respectfully requested that rehearing be granted to reconsider this issue.

B. IN LIGHT OF THE UNCONSTITUTIONALITY OF THE LICENSING PROVISIONS OF SECTION 520.32, FLA. STAT., CHAPTER 687 MAY NOT CONSTITUTIONALLY BE APPLIED TO CREDICORP.

In Part III of the Opinion, this Court held that the licensing requirements of Section 520.32 ". . . may not be constitutionally applied to Credicorp because they constitute a flat-sum licensing tax which . . . violates the Commerce Clause." (Slip. op. at 10). Notwithstanding this holding, in Part IV of the opinion, this Court also held that "interstate

firms may either voluntarily comply with the Florida state licensing provisions [of Section 520.32] or may comply with the substantive regulatory provisions [of the Loan Broker Act]." (Slip op. at 23). In reaching these inconsistent holdings, it is respectfully submitted that this Court overlooked the constitutional ramifications which necessarily flow from such a conclusion. Although this Court correctly struck down the licensing requirement of Section 520.32 in Part III of its opinion, this requirement was, for all practical purposes, resurrected and approved as applied to out-of-state retail installment sellers in Part IV by requiring such entities to either voluntarily submit to Florida's unconstitutional licensure requirement or alternatively to comply with the regulatory provisions of the Loan Broker Act. Under this holding, if an out-of-state retail installment seller accepts this Court's second option and proceeds under the Loan Broker Act, it faces constitutionally impermissible discrimination because it is prohibited from charging an advance fee under Section 687.141(1), an act which is not foreclosed to licensed in-state retail installment sellers. We do not believe this was the result this Court intended.

To illustrate, assume the existence of an out-of-state retail installment seller called Company B which fully discloses in its initial solicitations that it is a home-shopping club located and licensed in Georgia that, for $29.95, offers a membership in its club and a line of credit for $10,000 to be used solely for purchasing its merchandise. Because Company B sends solicitations to more than 20 different states, all of which have their own licensing schemes, Company B does not seek a Florida license under Section 520.32, Fla. Stat., but

instead opts to proceed under the Loan Broker Act. However, Company B now finds that, unlike its Florida counterparts, it cannot charge an advance fee for its services without running afoul of subsection 687.141(1) which provides: "No loan broker shall: (1) Assess or collect an advance fee from a borrower to provide services as a loan broker." If it should charge an advance fee, it would, unlike its Florida counterparts, be subject to the harsh criminal penalties in Section 687.146 (third degree felony) and/or administrative fines in the amount of $5,000 for each violation in Section 687.143(3). Thus, application of the Loan Broker Act to out-of-state retail installment sellers results in discriminatory treatment vis-a-vis similarly situated licensed in-state sellers.

In analyzing the constitutionality of a regulatory statute under the Commerce Clause, "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 37, 100 S.Ct. 2009, 2016 (1980). While Section 687.141 is not the type of overtly protectionist legislation struck down in Lewis, that is not the end of the inquiry under the Commerce Clause as Judge Allen correctly indicates in his dissenting opinion. (Slip op. at 31-32).

Instead, where a statute appears to regulate evenhandedly but, in practical effect, discriminates against interstate commerce as demonstrated above, the court must further inquire whether a legitimate state purpose exists and, if so, whether it could be promoted as well with a lesser impact on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S.

137, 143, 90 S.Ct. 844, 847 (1970). According to the Department of Banking and Finance ("Department"), Chapter 687 was enacted to protect the public against fraud and deceit.[2] (Department's Answer Brief at 10). Companies, however, that are either subject to federal regulation or licensed as a retail installment sales company in Florida can take advantage of an exemption provided in Section 687.14(4) and escape this regulation. Conversely, out-of-state retail installment sellers which are not licensed in Florida cannot. This artificial distinction does not appear to further the state's interest in protecting the public against fraud. More importantly, the legislative history of the Loan Broker Act reveals that the Florida Legislature did not intend a discriminatory result and, in fact, did not intend for the Act to apply to any retail installment sales companies, irrespective of their location. See Staff of Fla. H.R. Comm. on Commerce, (S/HB 837 (1991) Staff Analysis (final June 4, 1991) (R. 1397-1402).

The Court notes in its opinion that ". . . Credicorp raises no argument that it is unable to meet one of the exceptions of Section 687.14, only that it may not constitutionally be required to meet one of the exceptions." (Slip. op. at 21). The Court overlooked in its opinion the fact that this case originated as an enforcement proceeding seeking to penalize Credicorp retrospectively for conduct that had already occurred. Credicorp, therefore, lacked any opportunity to alter its business structure so as to qualify under any of the exceptions contained in Section 687.14. Further, as argued elsewhere in this motion,

[2] Although as noted by this Court, the Department's final order rejected any finding that Credicorp's solicitations operated as a fraud or deception upon Florida residents.

Credicorp should not be required to waive an unconstitutional licensure requirement in order to engage in the same activities allowed by in-state retail installment sellers.

Notwithstanding, if it is still this Court's considered opinion that the Loan Broker Act applies to all out-of-state unlicensed retail installment sales companies, the Act must be stricken as an impermissible burden on interstate commerce because an alternative means exists that could promote the state interest as well without discriminating against interstate activities. As suggested by Judge Allen in his dissent, "[t]he discriminatory effect could easily be removed by making the loan broker statutes applicable to all retail installment sellers." (Slip op. at 31). While we do not believe that the legislature intended the purview of the Act to have such a broad scope, it is, nonetheless, a matter for the Florida Legislature to decide - not this Court.

Because the Loan Broker Act as applied to unlicensed out-of-state retail installment sale companies discriminates against interstate commerce, Credicorp respectfully submits that rehearing should be granted to reconsider this issue.

II. MOTION FOR REHEARING EN BANC

In support of its Motion for Rehearing En Banc, Credicorp respectfully submits that because the Loan Broker Act, Chapter 687, Fla. Stat. as applied to unlicensed out-of-state retail installment sales companies discriminates against interstate commerce, rehearing en banc should be granted to reconsider this issue. The effect of the Court's opinion will allow retail installment companies located and licensed in Florida under Chapter 520 to engage

in acts prohibited by Chapter 687 for out-of-state retail installment sales companies who cannot be constitutionally required to obtain a license under Chapter 520. Consequently, this case is of exceptional importance both to Credicorp and to all similarly situated retail installment sales companies wishing to solicit business from Florida citizens. For this reason, Credicorp respectfully submits that this matter should be reconsidered by the Court en banc.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

RESPECTFULLY SUBMITTED this 15th day of August, 1995.

William E. Williams, Esq.
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Rex D. Ware, Esq.
Florida Bar No. 439169
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COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing MOTION FOR REHEARING AND REHEARING EN BANC has been furnished, by Hand Delivery, this 15th day of August, 1995, to the following:

Bridget L. Ryan
H. Richard Bisbee
Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, FL 32399-0350

Attorney

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

CREDICORP, INCORPORATED, a Texas Corporation, John Rheinfrank, individually and as President of Credicorp, Inc., Stevan W. Brown, individually and as Vice President of Credicorp, Inc.,

Respondents/Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Petitioner/Appellee.

_____/

CASE NO. 94-00440
DOAH CASE NO. 93-0911

APPELLANTS' MOTION FOR CERTIFICATION

Appellants, Credicorp, Incorporated, John Rheinfrank, individually and as President of Credicorp, Inc., and Stevan W. Brown, individually and as Vice President of Credicorp, Inc. (hereinafter referred to collectively as "Credicorp"), by and through its undersigned counsel, respectfully move the Court pursuant to Rule 9.330, Florida Rules of Appellate Procedure, to certify that Part IV[1] of its Opinion rendered July 17, 1995, passes on a question of great public importance and shows the Court as follows:

[1] Part IV is mislabeled in the Opinion as a second "Part III."

1. In Part IV of its Opinion, this Court held that out-of-state firms may either voluntarily comply with Florida's licensing provision for retail installment sales companies under Section 520.32, Fla. Stat. (the Retail Installment Sales Act), or alternatively, comply with the substantive regulatory provisions of Section 687.141, Fla. Stat. (the Loan Broker Act). (Slip Op. at 23). This holding appears to conflict with this Court's holding in Part II of the Opinion that the licensing provisions in Chapter 520 cannot be constitutionally applied to out-of-state retail installment sales companies because they constitute a flat-sum licensing tax in violation of the Commerce Clause of the United States Constitution. Quill Corp. v. North Dakota, ___ U.S. ____, 112 S.Ct. 1904 (1992); National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 754, 758, 87 S.Ct. 1389 (1967); Armstrong v. City of Tampa, 188 So. 2d 195 (Fla. 1960); Olan Mills v. City of Tallahassee, 100 So. 2d 164 (Fla. 1958), cert. denied, 359 U.S. 924, 79 S.Ct. 604 (1959); City of Tampa v. Carolina Freight Carriers Corp., 529 So. 2d 324 (Fla. 2d DCA 1988).

2. The Court's decision creates a conflict for out-of-state retail installment sales companies like Credicorp whose only contact with the State of Florida is through common carriers and the United States mail. Under the Court's decision, these companies must either comply with the licensing provisions of Chapter 520, which is violative of the Commerce Clause, or submit to the regulatory provisions of the Loan Broker Act, which would also result in a violation of the Commerce Clause, since the Loan Broker Act treats out-of-state retail installment sellers differently from licensed in-state retail installment

sellers. Specifically, under the Loan Broker Act, licensed in-state retail installment sellers are exempt from regulation under the Act. See § 687.14(4), Fla. Stat. Therefore, a licensed retail installment sales company located in Florida could never be classified or regulated as a loan broker even if it charges advance fees. Conversely, under this Court's interpretation of the Loan Broker Act, an out-of-state retail installment seller that is not constitutionally required to obtain a retail installment sales license in Florida is a loan broker and thus subject to regulation under the Loan Broker Act for engaging in the same conduct as its licensed in-state counterpart. This interpretation results in impermissible discrimination against out-of-state businesses such as Credicorp under the Commerce Clause of the United States Constitution.

3. Determination of this case by the Florida Supreme Court will resolve the inherent conflict created by this Court's decision and its concomitant constitutional ramifications while also providing guidance to all similarly situated out-of-state retail installment sellers who seek to solicit business in Florida. Accordingly, Credicorp respectfully requests this Court certify the following question to the Florida Supreme Court as one of great public importance:

> WHETHER FLORIDA MAY CONSTITUTIONALLY APPLY THE PROSCRIPTIONS OF THE LOAN BROKER ACT SET FORTH IN SECTIONS 687.14-.148, FLORIDA STATUTES, TO OUT-OF-STATE RETAIL INSTALLMENT SALES COMPANIES WHO ARE NOT REQUIRED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY UNDER SECTION 520.32, FLORIDA STATUTES?

Wherefore, Appellants, Credicorp, Incorporated, John Rheinfrank, individually and as President of Credicorp, Inc., and Stevan W. Brown, individually and as Vice President of Credicorp, Inc. Credicorp, respectfully request that the Court certify its Opinion to the Florida Supreme Court as passing upon the foregoing question of great public importance.

RESPECTFULLY SUBMITTED this 1st day of August, 1995.

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COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing MOTION FOR CERTIFICATION has been furnished, by Hand Delivery, this 15th day of August, 1995, to the following:

Bridget L. Ryan
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Tallahassee, FL 32399-0350

Attorney

RECEIVED
AUG 2 1995
HUEY, GUILDAY & TUCKER, P.A.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

CREDITCORP, INCORPORATED, a Texas Corporation, JOHN RHEINFRANK, individually and as President of Creditcorp Inc., and STEVEN W. BROWN, individually and as Vice President of Creditcorp, Inc.,

Appellants,

vs. CASE No. 94-440

STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE,

Appellee.
_____/

MOTION FOR REHEARING

COMES NOW, the State of Florida Department of Banking and Finance (hereinafter the Department) pursuant to Fla. R. App. P. 9.330(a) and respectfully moves this Court for rehearing in this case and as grounds therefore states:

In a scholarly opinion, this Court felt constrained to conclude that Chapter 520, Florida Statutes, violated the Commerce Clause of the United States Constitution. In so holding, the Court relied in part on Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992). Opinion at 9. The Department respectfully submits that Quill Corp. has been misapprehended as it pertained to the imposition of a use tax on an out-of-state mail order seller. In

contrast, the Department is not attempting to tax an out-of-state seller. Pursuant to the provisions of Chapter 520, the Department is attempting to prohibit misrepresentations regarding ongoing retail installment contracts with residents of the State of Florida. Therefore, the licensing requirement of Section 520.32(1), Florida Statutes (1991), is not a revenue producing tax. Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977), is a case analogous with the present case. In LaFollette, the state of Wisconsin exercised its police power to prevent an out-of-state mail order catalogue company with no physical presence within the state from charging usurious interest rates to Wisconsin citizens who utilized the company's credit plan. The court held that the fee imposed under Wisconsin's police action was not a tax, but an interstate company's constitutionally approved contribution towards the payment of the administrative expenses incurred under the act in question. Id. at 750. This distinction between a licensing fee and a tax was recognized by the Supreme Court in Union Brokerage Co. v. Jensen, 322 U.S. 202, 64 S.Ct. 967 (1944), which held that a licensing fee was not a tax as it was "supervisory and not a fiscal measure." Id. at 210, 64 S. Ct. at 973. The Supreme Court in Jensen also recognized the distinction between a state granting companies "certificates to do business within her borders [as] a conventional means of assuring responsibility and fair dealing on

the part of foreign corporations coming into a State," Id. at 210, 64 S. Ct. at 972, and instances where "a foreign corporation [is] merely coming into [a state] to contribute to or to conclude a unitary interstate transaction ...." Id. at 211, 64 S. Ct. at 973. These two fundamental distinctions make Quill Corp. inapplicable to the case at bar. See also Toulsey v. North American Van Lines, Inc., 752 F.2d 96, 100, 103 (4th Cir. 1985)(business opportunity registration required); Silver v. Woolf, 694 F.2d 8, 11-12 (2d Cir. 1982)(which distinguished a license fee from a tax); Underhill Associates, Inc. v. Bradshaw, 674 F. 2d 293 (4th Cir. 1982) (which required out-of-state brokers to register despite commerce clause objections);[1] cf. Bateman v. City of Winter Park, 37 So.2d 362 (Fla. 1948)(for state tax purposes a tax is a fee exacted solely for revenue purposes); City of Jacksonville v. Jacksonville Maritime Ass'n, 492 So. 2d 770, 772 (Fla. 1st DCA 1986)(same). In contrast with Quill Corp., Creditcorp is entering into extended business relationships with Florida residents and is in fact offering to compensate them to solicit business on its behalf in Florida. Record at 654.

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[1]While these cases predate Quill Corp., they were decided after National Bella Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), and Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), which was relied on by the Supreme Court in Quill Corp.

The Department respectfully submits that the Florida cases referred to on pages 9-10 of the Court's Opinion are also inapplicable. In each of those cases the activity taxed was an integral part or an inseparable link in the chain of events of the interstate movement of goods. Armstrong v. City of Tampa, 118 So. 195, 199 (Fla. 1960); Olan Mills, Inc. v City of Tallahassee, 100 So. 2d 164, 166 (Fla. 1958); Tampa v. Carolina Freight Carriers Corp., 529 So. 2d 324, 327, (Fla. 2d DCA 1988).[2] However, in the case at bar, no attempt is being made to impose a fee as a condition precedent to the privilege of making sales to Florida residents. The Department merely seeks to require persons who wish to enter into extended business relationships with Florida residents to pay their fair share of the regulatory costs to ensure that Florida consumers are protected from misrepresentation.

As the Department has indicated previously in its brief on pages 27-28, states may regulate matters of local concern. This Court correctly observed that "the licensing provision in section 520.32(2) ... is first and foremost state regulation of a matter of local concern through the police power." Opinion at 10. Chapter 520, Florida Statutes, is a truth-in-lending statute and the local

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[2]Olan Mills, Inc., relied on Spector Motor Service, Inc., v. O'Connor, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed.573 (1951), which was overruled in Complete Auto Transit, Inc., 430 U.S. at 289, 97 S.Ct. at 1084, 51 L.Ed.2d at ___. Armstrong relied on Olan Mills, Inc. City of Tampa relied on Armstrong.

nature of this type of regulation has been recognized by federal truth-in-lending statutes. Title 15 U.S.C. § 1610 provides that the Truth-in-Lending Act does "not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title and then only to the extent of the inconsistency." See also Heastie v. Community Bank of Greater Peoria, 690 F. Supp. 716, 720 (N.D. Ill. 1988)("Preemption does not extend to general state statutes prohibiting fraud.). Therefore, state regulation of out-of-state retail installment sellers is permissible. See Silver, 694 F.2d at 12-13 (debt collection); Bradshaw, 674 F.2d at 295-96 (securities regulation); Aldens, Inc. v. Packel, 524 F. 2d 38, 46, 49 (3d Cir. 1975) (interest rate regulation); see also Quill Corp., 112 S. Ct. at 1909 ("Congress has plenary power to ... authorize state actions that burden interstate commerce ...."). Based upon the foregoing, the Department requests that this Court grant the Motion for Rehearing as it is respectfully suggested that the Court has misapplied cases dealing the imposition of revenue producing measures to the case at bar which involves a state truth-in-lending statute which imposes regulatory fees in matters of legitimate local concern.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were sent by U. S. Regular Mail to the listed persons below on this 1 day of August, 1995.

PAUL C. STADLER, JR.

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SEP 14 1995
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September 13, 1995

CASE NO: 94-00440

L.T. CASE NO. 93-0911

Credicorp, Incorporated, a Texas Corporation, etal — Appellant(s),

v.

State, Department of Banking and Finance — Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing, filed August 1, 1995, is DENIED.

Appellants' motion for rehearing and rehearing en banc, filed August 1, 1995, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Sandra Joyner
Deputy Clerk

Copies:

William E. Williams
Vikki R. Shirley
Paul C. Stadler, Jr.
Rex D. Ware
Bridget L. Ryan

Rule of Appellate Procedure 9.130(a)(3).

On February 5, 1993, Charles and Margie Brown filed a personal injury action against Sheriff McMillian alleging injuries incurred by Charles Brown as a result of a slip and fall at the Walton County Jail where he was being detained. In June 1990, nearly three years prior to the filing of the complaint, the Browns provided notice of their claim to Sheriff McMillian and to the Department of Insurance (the Department) as required by section 768.28(6), Florida Statutes (1991). The complaint alleged that a claim had been presented in writing to both Sheriff McMillian and to the Department and, further, that all conditions precedent had been performed or occurred.

Sheriff McMillian was served with process within the 120 days permitted by Florida Rule of Civil Procedure 1.070(i) (formerly designated 1.070(j)), and filed an answer and affirmative defenses, specifically admitting the allegation that a written claim had been provided both to him and to the Department and that all conditions precedent had been performed. The statute of limitations ran on this action in February 1994. On March 11, 1994, Sheriff McMillian submitted a motion to file an amended answer and affirmative defenses. In support thereof, McMillian alleged that, after the filing of his initial answer, he had become aware of an additional affirmative defense, namely, that the Browns had failed to serve a copy of the summons and complaint on the Department, as required by section 768.28(7), Florida Statutes. On April 5, 1994, beyond the 120-day period following the filing of the complaint, the Department was served. Shortly thereafter, on April 11, 1994, Sheriff McMillian filed a motion to dismiss the complaint on the basis that the Browns had failed to serve the Department within 120 days of the filing of the complaint, in violation of Fla.R.Civ.P. 1.070(i).

On April 14, 1994, the trial court entered an order denying both the motion to amend the answer and affirmative defenses and the motion to dismiss, specifically finding that at no time prior to the running of the statute of limitations did Sheriff McMillian assert the defenses of lack of personal jurisdiction, insufficiency of process, or insufficiency of service. Opining that the Browns would be unduly prejudiced by a dismissal of their complaint at this late juncture, the trial court concluded that Sheriff McMillian had waived his right to reap the benefits of the 120-day service rule.

In *Austin v. Gaylord*, 603 So. 2d 66 (Fla. 1st DCA 1992), this court reviewed an order denying defendant state attorney Austin's motion to dismiss a complaint for failure to serve the Department within 120 days. We concluded that the order denying Austin's motion to dismiss for noncompliance with Fla.R.Civ.P. 1.070(i) was an appealable nonfinal order under Fla.R.App.P. 9.130(a)(3)(C)(i). This determination was based on our holding that service of process on the Department within 120 days of filing the initial pleading is essential to acquire jurisdiction over the state agency. We further concluded that "noncompliance with the statutory requirement of service of process on the Department of Insurance to obtain jurisdiction over Austin as state attorney involves the legality of the service of process itself as distinguished from the mere timeliness of such service already accomplished." *Austin*, 603 So. 2d at 68. On the merits, deeming the requirement of service within 120 days found in rule 1.070(j) to be mandatory, we reversed the order and remanded with directions that the action be dismissed for the failure to serve the Department within 120 days.

We have since receded from *Austin* in *Platt v. Florida Department of Health and Rehabilitative Services*, Case Nos. 94-2981/94-2980 (Fla. 1st DCA Aug. 28, 1995). In *Platt*, we adopted the rationale espoused by the Fifth District Court of Appeal in *Turner v. Gallagher*, 640 So. 2d 120 (Fla. 5th DCA 1994), that because the Department is not a "party defendant" in actions against the state or its agencies or subdivisions under section 768.28, Florida Statutes, it follows that rule 1.070(i) is not implicated by the failure to serve the Department within 120 days. In *Platt*, we reversed the dismissal of the plaintiffs' complaints against the Department of Health and Rehabilitative Services. The nature of the orders of dismissal therein being final and appealable, the question of this court's jurisdiction was not at issue.

Sub judice, having declared essentially in *Platt* that service of process on the Department may be accomplished beyond the 120-day requirement in Fla.R.Civ.P. 1.070(i), without the harsh result of dismissal where the state agency is served within 120 days, we now conclude that the issue of service of process on the Department is a matter of timeliness. As such, we hold that since the trial court's order herein was, in effect, an order denying Sheriff McMillian's motion to dismiss the action for failure to serve process timely, it is not an appealable nonfinal order under Fla.R.App.P. 9.130(a)(3). In so holding, we adopt the recent opinion of the Second District Court of Appeal in *Cannon v. Yager*, 20 Fla. L. Weekly D1584 (Fla. 2d DCA July 7, 1995).[1]

APPEAL DISMISSED. (KAHN and VAN NORTWICK, JJ., CONCUR.)

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[1]We recognize the following conflicting decision on the jurisdictional issue. *Sheriff of Brevard County v. Lampman-Prusky*, 634 So. 2d 660 (Fla. 5th DCA 1994) (accepting jurisdiction from denial of sheriff's motion to dismiss for failure to perfect service on the Department within 120 days of filing suit).

* * *

Administrative law—Department of Banking and Finance—Loan broker regulations—Question certified

CREDICORP, INCORPORATED, a Texas corporation, JOHN RHEINFRANK, individually and as President of Credicorp, Inc., and STEVEN W. BROWN, individually and as Vice President of Credicorp, Inc., Appellants, v. STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE, Appellee. 1st District. Case No. 94-440. Opinion filed September 13, 1995. An appeal from an Order of the Department of Banking and Finance. Counsel: William E. Williams, Rex D. Ware, and Vikki R. Shirley of Huey, Guilday & Tucker, P.A., Tallahassee, for appellants. Bridget L. Ryan, Assistant General Counsel, Department of Banking & Finance, Tallahassee, for appellee.

ON MOTION FOR CERTIFICATION
[Original Opinion at 20 Fla. L. Weekly D1639a]

(KAHN, J.) We grant in part appellant's motion for certification and certify the following as a second question of great public importance passed upon by this decision:

MAY FLORIDA CONSTITUTIONALLY APPLY THE LOAN BROKER ACT, SECTION 687.14-687.148, FLORIDA STATUTES, TO AN OUT-OF-STATE RETAIL INSTALLMENT SELLER WHICH, UNDER THE COMMERCE CLAUSE, MAY NOT BE COMPELLED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY UNDER SECTION 520.32, FLORIDA STATUTES?

(BARFIELD and ALLEN, JJ., CONCUR.)

* * *

Criminal law—Information—Possession of cannabis with intent to distribute

CHARLES JOSEPH DANIEL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-1827. Opinion filed September 13, 1995. An appeal from the Bay County Circuit Court, Don T. Simmons, Judge. Counsel: Nancy A. Daniels, Public Defender; Terry Carley, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Thomas Crapps, Assistant Attorney General, for Appellee.

ON MOTION FOR REHEARING AND TO SUPPLEMENT THE RECORD
[Original Opinion at 20 Fla. L. Weekly D1500a]

(PER CURIAM.) We grant the appellee's motion for rehearing and the motion to supplement the record with an amended information that was inadvertently omitted from the record on appeal. *See Kubernac v. Reid*, 656 So. 2d 930 (Fla. 1st DCA 1995) (granting rehearing on the basis of a supplemental record); *Stewart v. State*, 508 So. 2d 564 (Fla. 4th DCA 1987) (same). The amended information conclusively demonstrates that the

V.RS

IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA,
FIRST DISTRICT

Case No. 94-440

CREDICORP, INC., et al.,

Respondent/Appellants,

vs.

THE DEPARTMENT OF BANKING
AND FINANCE, DIVISION OF
FINANCE,

Petitioner/Appellee.
_____/

NOTICE OF APPEAL

RECEIVED
OCT 9 1995
HUEY, GUILDAY
& TUCKER, P.A.

NOTICE IS GIVEN that the State of Florida Department of Banking and Finance, Division of Finance, Petitioner/Appellee, appeals to the Supreme Court, the order of this court rendered September 13, 1995. The nature of the order is a final order finding as violative of the Commerce Clause of the United States Constitution the license requirement and the annual fee requirement of The Retail Installment Sales Act, Chapter 520, Part II, Florida Statutes, upon a retail installment seller that actively solicits and sells to Florida residents, but reaches this State only by United States mail and common carrier.

PAUL C. STADLER, JR.
Assistant General Counsel
Office of the Comptroller
State of Florida
The Capitol, Suite 1302
Tallahassee, Fla. 32399
(904) 488-9896
Fla. Bar No. 335991

CERTIFICATE OF SERVICE

The undersigned certified that true and correct copies of the foregoing were duly sent by U.S. Mail to the attached list this 6 day of October, 1995.

PAUL C. STADLER, JR.
Assistant General Counsel

Service List

William E. Williams
Huey, Guilday & Tucker, P.A.
Highpoint Center, Suite 900
106 East College Ave.
P.C. Box 1794
Tallahassee, Fla. 32302

C:\WPDOCS\BRIEFS\CREDI.APP

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

CREDICORP, INCORPORATED, a Texas corporation, JOHN RHEINFRANK, individually and as President of Credicorp, Inc., STEVAN W. BROWN, individually and as Vice President of Credicorp, Inc.,

Defendants/Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Plaintiff/Respondent.

DCA Case No.: 94-00440
DOAH Case No.: 93-0911

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Credicorp, Inc., John Rheinfrank, and Stevan W. Brown, Defendants/Petitioners, invoke the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered September 13, 1995. The decision passes on a question certified to be of great public importance.

Respectfully submitted,

William E. Williams
Vikki R. Shirley
HUEY, GUILDAY & TUCKER, P.A.
106 E. College Ave., Ste. 900
P. O. Box 1794
Tallahassee, FL 32302
(904) 224-7091
Attorneys for Defendants/Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice to Invoke Discretionary Jurisdiction has been furnished by regular U. S. Mail to Bridget L. Ryan, Assistant General Counsel, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350, this 10th day of October, 1995.

ATTORNEY

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CREDICORP, INCORPORATED, a Texas corporation, JOHN RHEINFRANK, individually and as President of Credicorp, Inc., and STEVEN W. BROWN, individually and as Vice President of Credicorp, Inc.,

Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Appellee.

_____/

CASE NO. 94-440

RECEIVED
SEP 15 1995
HUEY, GUILDAY & TUCKER, P.A.

Opinion filed September 13, 1995.

An appeal from an Order of the Department of Banking and Finance.

William E. Williams, Rex D. Ware, and Vikki R. Shirley of Huey, Guilday & Tucker, P.A., Tallahassee, for appellants.

Bridget L. Ryan, Assistant General Counsel, Department of Banking & Finance, Tallahassee, for appellee.

ON MOTION FOR CERTIFICATION

KAHN, J.

We grant in part appellant's motion for certfication and certify the following as a second question of great public importance passed upon by this decision:

MAY FLORIDA CONSTITUTIONALLY APPLY THE LOAN BROKER ACT, SECTION 687.14-687.148, FLORIDA STATUTES, TO AN OUT-OF-STATE RETAIL INSTALLMENT SELLER WHICH, UNDER THE COMMERCE CLAUSE, MAY NOT BE COMPELLED TO BE LICENSED IN FLORIDA AS A RETAIL INSTALLMENT SALES COMPANY UNDER SECTION 520.32, FLORIDA STATUTES?

BARFIELD and ALLEN, JJ., CONCUR.

Supreme Court of Florida

FRIDAY, OCTOBER 13, 1995

OCT 17 1995

HUEY, GUILLOTY & TUCKER, P.A.

CREDICORP, INCORPORATED, etc., et al.,	*	
Petitioners,	*	
v.	*	CASE NO. 86,624
DEPARTMENT OF BANKING AND FINANCE,	*	District Court of Appeal, 1st District - No. 94-440
Respondent.	*	

ORDER POSTPONING DECISION ON JURISDICTION AND BRIEFING SCHEDULE

The Court has postponed its decision on jurisdiction. Petitioner's brief on the merits shall be served on or before November 7, 1995; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all brief.

Please send to the Court, either in Word Perfect format or ASCII text format, a 3-1/2" diskette of the briefs filed in this case. This procedure is voluntary. PLEASE LABEL ENVELOPE TO AVOID ERASURE.

The Clerk of the District Court of Appeal, First District, shall file the original record on or before December 12, 1995.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Jon S. Wheeler, Clerk

Mr. William E. Williams
Ms. Vikki R. Shirley
Ms. Bridget L. Ryan

SUPREME COURT OF FLORIDA

CREDICORP, INCORPORATED, a Texas corporation, JOHN RHEINFRANK, individually and as President of Credicorp, Inc., STEVAN W. BROWN, individually and as Vice President of Credicorp, Inc.,

Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Respondent.
_____/

CASE NO. 86,624

District Court of Appeal
1st District - No. 94,440

PETITIONERS' MOTION TO CONSOLIDATE

Petitioners, Credicorp, Incorporated, John Rheinfrank, and Stevan W. Brown ("Credicorp"), by and through their undersigned counsel, move to consolidate this action for purposes of oral argument with the following action now pending in this Court:

> Department of Banking and Finance v. Credicorp, Incorporated, a Texas corporation, John Rheinfrank, individually and as President of Credicorp, Inc., and Stevan W. Brown, individually and as Vice President of Credicorp, Inc., Case No. 86,601, DCA No. 94-440

and in support thereof state as follows:

1. Both Case Nos. 86,601 and 86,624 arise out of an appeal of the same Final Order of the Department of Banking and Finance before the District Court of Appeal, First District.

2. The Department of Banking and Finance filed a Notice of Appeal invoking the jurisdiction of this Court on October 6, 1995. That appeal was assigned Case No. 86,601 before this Court.

3. Credicorp filed a Notice to Invoke Discretionary Jurisdiction on October 10, 1995. That appeal was assigned Case No. 86,624 before this Court. An Order Postponing Decision on Jurisdiction and Briefing Schedule was rendered by this Court on October 13, 1995.

4. Both appeals involve issues of law arising out of the same factual context and between identical parties.

5. Consolidation will not prejudice the rights of either party.

6. Consolidation will promote the just, speedy, and inexpensive resolution of the proceedings.

7. Counsel for the Respondent has authorized the undersigned to represent that the Respondent has no objection to consolidation of the two appeals.

Wherefore, Petitioners respectfully request this Court to consolidate the cases for purposes of oral argument to avoid unnecessary costs and delay.

Dated this 7th day of November, 1995.

Respectfully submitted,

William E. Williams
Rex D. Ware
Vikki R. Shirley
HUEY, GUILDAY & TUCKER, P.A.
106 E. College Ave., Ste. 900
P. O. Box 1794
Tallahassee, FL 32302
(904) 224-7091
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by hand delivery to Paul C. Stadler, Jr., Assistant General Counsel, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350 this 7th day of November, 1995.

ATTORNEY