

0-17

IN THE SUPREME COURT
FOR THE STATE OF FLORIDA
CASE NO. 86,601
[RELATED CASE NO. 86,624]

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

Appellant,

vs.

CREDICORP, INC., et al.,,

Appellees.

FILED

SID J. WHITE

OCT 25 1995

CLERK, SUPREME COURT

By Chief Deputy Clerk

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

INITIAL BRIEF OF THE APPELLANT
STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE
DIVISION OF FINANCE

PAUL C. STADLER, JR.
Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399-0350
(904) 488-9896
Attorney for Appellant
Dept. of Banking and Finance

TABLE OF CONTENTS

	PAGE
Table of Citations.....	2
Statements of the Case and Facts.....	5
Summary of Argument.....	9
Argument:	
I OVERVIEW.....	10
II APPLICATION OF LICENSING PROVISIONS TO INTERSTATE COMMERCE.....	11
III CONCLUSION.....	22

TABLE OF CITATIONS

CASES:	Page
<u>Aldens, Inc. v. LaFollette</u> , 552 F.2d 745 (7th Cir. 1977), <u>cert. denied</u> , 434 U.S. 880, 98 S. Ct. 236, 54 L.Ed.2d 161 (1977).....	14, 15
<u>Aldens, Inc. v. Packel</u> , 524 F.2d 38 (3d cir. 1975), <u>cert denied</u> , 425 U.S. 943, 96 S. Ct. 1684, 48 L.Ed.2d 187 (1976).....	22
<u>Armstrong v. City of Tampa</u> , 118 So. 195 (Fla. 1960).....	21
<u>Bateman v. City of Winter Park</u> , 37 So.2d 362 (Fla. 1948).....	16
<u>California v. Fairfax Family Fund, Inc.</u> , 47 Cal. Rptr. 812 (Cal. Dist. Ct. App. 1964), <u>appeal dismissed</u> , 382 U.S. 1, 86 S. Ct. 34, 15 L. Ed.2d 6 (1965).....	15
<u>California v. Thompson</u> , 313 U.S. 109, 61 S. Ct. 930 (1941).....	13
<u>Center for Auto Safety, Inc. v. Athey</u> , 37 F.3d 139 (4th Cir. 1994).....	18,19
<u>City of Jacksonville v. Jacksonville Maritime Ass'n</u> , 492 So.2d 770 (Fla. 1st DCA 1986)....	16
<u>Complete Auto Transit, Inc. v. Brady</u> , 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed.2d 326 (1977)..	15,21
<u>Derico v. Duncan</u> , 410 So.2d 27 (Ala. 1982).....	16
<u>Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.</u> 405 U.S. 703, 92 S. Ct. 1349, 31 L.Ed.2d 620 (1972)..	16,17,18
<u>Heastie v. Community Bank of Greater Peoria</u> , 690 F. Supp. 716 (N.D. Ill. 1988)....	22
<u>Interstate Towing Ass'n, Inc., v. City of Cincinnati, Ohio</u> , 6 F.3d 1154 (6th Cir. 1993).....	14

<u>L.P. Acquisition Co. v. Tyson,</u> 772 F.2d 201 (6th Cir. 1985)(per curiam).....	22
<u>Maine v. Taylor,</u> 477 U.S. 131, 106 S. Ct. 2440, 91 L.Ed.2d 110 (1986)	20
<u>Middle South Energy, Inc. v. Arkansas Public Service Comm'n,</u> 772 F.2d 404 (8th Cir. 1985), <u>cert denied,</u> 474 U.S. 1102, 106 S. Ct. 884, 88 L. Ed. 2d 919 (1986).....	22
<u>National Awareness Foundation v. Abrams,</u> 50 F.3d 1159 (2d Cir. 1995).....	15,16
<u>National Bella Hess, Inc. v. Department of Revenue of Ill.,</u> 386 U.S. 753, 87 S. Ct. 1389, 18 L.Ed.2d 505 (1967).....	15
<u>National Cable Television Ass'n, Inc. v. United States,</u> 415 U.S. 336, 94 S. Ct. 1146, 39 L.Ed.2d 370 (1974).....	12
<u>New York State Dept. of Environmental Conservation v. United States Dept. of Energy,</u> 850 F. Supp. 132 (N.D.N.Y. 1994).....	15
<u>Olan Mills, Inc. v. City of Tallahassee,</u> 100 So.2d 164 (Fla. 1958).....	21
<u>Pike v. Bruce Church, Inc.,</u> 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970).....	14
<u>Quill Corp. v. North Dakota,</u> 112 S. Ct. 1904 (1992).....	11,13, 15,16,22
<u>Reno v. Flores,</u> 113 S. Ct. 1439 (1993).....	17
<u>Scripto, Inc. v. Carson</u> 362 U.S. 207, 80 S. Ct. 619, 4 L. Ed. 660 (1960).....	20
<u>Silver v. Woolf,</u> 694 F.2d 8 (2d Cir. 1982), <u>cert denied</u> 460 U.S. 1070, 103 S. Ct. 1525, 75 L.Ed.2d 948 (1983).....	15,22
<u>Spector Motor Services, Inc. v. O'Connor,</u> 340 U.S. 602, 71 S. Ct. 508, 95 L.Ed. 573 (1951).....	21
<u>State v. Stadler,</u> 630 So.2d 1072 (Fla. 1994).....	17

<u>Tampa v. Carolina Freight Carriers Corp.,</u> 529 So.2d 324 (Fla. 2d DCA 1988).....	21
<u>Toulsey v. North American Van Lines, Inc.,</u> 752 F.2d. 96 (4th Cir. 1985).....	15
<u>Union Brokerage Co. v. Jensen,</u> 322 U.S. 202, 64 S. Ct. 967 (1944).....	13
<u>United States v. National Dairy</u> <u>Products Corp.,</u> 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed.2d 561 (1963).....	17
<u>Underhill Associates, Inc. v. Bradshaw,</u> 674 F.2d 293 (4th Cir. 1982)	15,22

STATUTES:

§215.321, Fla. Stat. (1991).....	9,10,12
§520.32, Fla. Stat. (1991).....	9,11,17
§520.32(1), Fla. Stat. (1991).....	9,10,12
§520.32(2), Fla. Stat. (1991).....	10,19,21
§520.32(3), Fla. Stat. (1991).....	10
§520.994, Fla. Stat. (1991).....	10
§520.995(1)(b) and (2)(a and b), Fla. Stat. (1991)...	10
§520.996 , Fla. Stat. (1991).....	10
§687.14 - 687.148.....	8
15 U.S.C. § 1610.....	21

STATEMENT OF THE CASE AND FACTS

As used herein the Petitioner, the State of Florida Department of Banking and Finance, Division of Finance, will be referred to as the Department. Credicorp, Inc., 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 as Credicorp.

The Department adopts the recitation of the facts as stated by the First District Court of Appeal in Part I of the opinion as modified below:

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 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. Therefore, Chapter

520 is a consumer protection statute enacted pursuant to this states' police powers and is not a taxing statute with the sole purpose of generating revenues for the state.

On July 17, 1995, the District Court entered its opinion, which held 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. In addition, the court certified the following question:

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 September 13, 1995, the District Court certified an additional question:

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 520.32, FLORIDA STATUTES?

SUMMARY OF ARGUMENT

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), Fla. Stat. (1991), is used for regulatory purposes. See Section 215.321, Fla. Stat. (1991). The United States Supreme Court has long recognized the distinction between "fees" assessed for benefits conferred and "taxes." License fees are a permissible charge to help defray the cost of that regulation and are therefore not a burden in the constitutional sense. Credicorp has the burden of proving that the license fees are arbitrary or unreasonable. Credicorp by its facial challenge to the validity of Section 520.32, Fla. Stat. (1991), has failed to meet that burden. Additionally, 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 in to extended business relationships with Florida residents to pay their fair share of the regulatory costs to ensure that Florida consumers are protected from misrepresentation. Based upon the foregoing, the Department submits that the District 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.

ARGUMENT

I.

OVERVIEW

Section 520.32(1), Fla. Stat. (1991), provides that "[a] person may not engage in or transact the business of a retail seller engaging in retail installment transactions ... without a license" A nonrefundable application fee not to exceed \$200 must accompany each application. Section 520.32(2), Fla. Stat. (1991). Every two years a renewal fee of up to \$200 must be remitted to keep a license active. Section 520.32(3), Fla. Stat. (1991). All funds received must be deposited into the Regulatory Trust Fund. Section 215.321, Fla. Stat. (1991).

The Department is also authorized to conduct investigations and examinations, see section 520.996, Fla. Stat. (1991), issue and serve subpoenas, administer oaths, seek injunctions, issue cease and desist orders, and impose administrative fines. Section 520.994, Fla. Stat. (1991). The Department may deny an application for license or revoke a license where, as in the case at bar, there has been misrepresentation in retail installment transactions. Section 520.995(1)(b) and (2)(a and b), Fla. Stat. (1991). Accordingly, Chapter 520 fosters consumer protection by requiring persons to demonstrate fitness for licensure prior to entering into retail installment transactions with Florida residents and further requires that fitness for licensure be maintained. Therefore, Chapter 520 is a consumer protection statute enacted pursuant to

this state's police powers and is not a taxing statute with the sole purpose of generating revenues for the state.

II.

APPLICATION OF LICENSING PROVISIONS TO INTERSTATE COMMERCE

The District Court, on page 15 of its opinion, accurately concluded:

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.

However, despite this observation, the District Court on page 10 held:

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.

In so holding, the District 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), Fla. Stat. (1991), is used for regulatory purposes. See Section 215.321, Fla. Stat. (1991). The United States Supreme Court has long recognized the distinction between "fees" assessed for benefits conferred and "taxes." That Court in National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340-41, 94 S. Ct. 1146, 1149, 39 L.Ed.2d 370, 375 (1974) (emphasis added, footnotes omitted) stated:

Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act. e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing the services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society....

The lawmaker may, in light of the "public policy or interest served," make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed; or the lawmaker may make a substantial levy to keep entrepreneurs from exploiting a semipublic cause for their own personal aggrandizement. Such assessments are in the nature of "taxes" which under our constitutional regime are traditionally levied by Congress.

There is not doubt that the main function of the [Federal Communications] Commission is to safeguard the public interest in the broadcasting activities of members of the industry. If assessments are made by the Commission against members of the industry which are sufficient to recoup costs to the commission for its oversight, the ... broadcasters would be paying not only for benefits they received but for the protective services rendered the public by the Commission.

Similarly, in the case at bar the license fees collected pursuant

to Chapter 520 recoup the costs for the benefits received by the retail installment sales industry and to the protective services rendered to the public.

This distinction between a licensing fee and a tax was also 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 California v. Thompson, 313 U.S. 109, 61 S. Ct. 930 (1941) (wherein the Supreme Court upheld a license fee as the statute was not a revenue measure, but was a permissible exercise of the state's power to regulate matters of local concern).

Very persuasive is the case of Interstate Towing Ass'n, Inc., v. City of Cincinnati, Ohio, 6 F.3d 1154 (6th Cir. 1993) (hereinafter Interstate). In Interstate out-of-state towing services challenged, on Commerce Clause grounds, Cincinnati's \$80 licensing fee requirement for tow trucks. In rejecting this challenge, the circuit court first observed that the fee was not

discriminatory because no distinction was made between in-state and out-of-state firms. Id. at 1162. Second, the court noted that the city had a legitimate local interest in regulating tow trucks and that the fee was used to defray inspection costs. Id. at 1162-63. Third, the court concluded that the license fee was not an impermissible burden on interstate commerce. Id. at 1163-64.¹ Specifically, the circuit court stated:

[Consumer protection] concerns have consistently been regarded as legitimate, innately local in nature, and presumptively valid, even where regulations enacted to address those concerns have an impact on commerce.

Id. at 1163. Similarly, in the case at bar, Credicorp has failed to prove that the biennial fees imposed by the State of Florida violate the Commerce Clause. See also Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970).

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), is another 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

¹As discussed below, the \$200 license fee amounts to only about 1% of the advance fees that Credicorp has received from Florida residents. In addition, as of June 1993, approximately 1,600,000 individuals nationwide had paid the annual fee, Opinion at 6, which amounts to estimated revenues of \$47,920,000. If every state in the union imposed a \$200 license fee on Credicorp, such fees would amount to a mere \$10,000.00 or .02% of the estimated advance fees received.

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 by the state in implementing the act. Id. at 750; 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), cert denied 460 U.S. 1070, 103 S. Ct. 1525, 75 L.Ed.2d 948 (1983). (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);² 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) (out-of-state small loan company, with no physical presence within the state, was required to be licensed); cf. National Awareness Foundation v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995) ("Thus, fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible [under the First Amendment]."); New York State Dept. of Environmental Conservation v. United States Dept. of Energy, 850 F. Supp. 132 (N.D.N.Y. 1994)

²While LaFollette, Toulsey, Silver, and Bradshaw 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.

(regulatory fees assessed against in-state facilities are not a tax); 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); Derico v. Duncan, 410 So.2d 27 (Ala. 1982) (which held that a licensing fee assessed to persons in the business of making consumer loans was not merely a revenue-producing tax).

However, even if this cause were to be viewed as a "tax" case, the Department respectfully submits that Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 703, 92 S. Ct. 1349, 31 L.Ed.2d 620 (1972) (hereinafter Delta) is far more analogous to the case at bar than Quill Corp. At issue in Delta was whether a \$1 charge per airline passenger to help defray the costs of airport construction constituted an unreasonable burden on interstate commerce. In analyzing this question, the United States Supreme Court distinguished the facts in Delta from earlier cases wherein the charge "was not limited ... to travelers asked to bear a fair share of the costs of providing public facilities that further travel." Id. at 712, 92 S. Ct. at 1353, 31 L.Ed.2d at 626. The Court went on to note:

Cases decided since Crandall have distinguished it on that ground and have sustained taxes "designed to make [interstate] commerce bear a fair share of the cost of the local government whose protection it enjoys."....

We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may

constitutionally be imposed on interstate and domestic users alike. The principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context. The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.

Id. at 712, 714, 92 S.Ct. at 1353-54, 31 L.Ed.2d at 626-27 (citation omitted).

Although in this cause the Department is not providing Credicorp with airport facilities, as recognized by the Court in National, the Department is providing a regulatory benefit to both the public and the retail installment industry. Accordingly, the license fees are a permissible charge to help defray the cost of that regulation and are therefore not a burden in the constitutional sense.

As noted in Delta, Credicorp has the burden of proving that the license fees are arbitrary or unreasonable. Credicorp by its facial challenge to the validity of Section 520.32, Fla. Stat. (1991), has failed to meet that burden. See also Reno v. Flores, 113 S. Ct. 1439, 1446 (1993) (a facial challenge to the validity of a statute must establish that no set of circumstances exist wherein the statute would be valid); United States v. National Dairy Products Corp., 372 U.S. 29, 31-32, 83 S. Ct. 594, 597, 9 L. Ed.2d 561, 565 (1963) (statutes have a strong presumption of validity); State v. Stadler, 630 So.2d 1072, 1076 (Fla. 1994) (doubt regarding the constitutionality of a statute should be resolved in favor of

its constitutionality).

The reasoning in Delta was followed in the case of Center for Auto Safety, Inc. v. Athey, 37 F.3d 139 (4th Cir. 1994), wherein a charity incorporated in Washington, D.C., sought to use direct-mail solicitations to non-members residing in Maryland. The charity refused to pay the \$200 annual fee and brought suit claiming that the fee violated the Commerce Clause together with other constitutional provisions. The Fourth Circuit characterized the \$200 annual fee as a "user fee" rather than a "revenue tax" and concluded:

Typical user fees involve users deriving benefits from the use of state facilities such as roads, highways, and airports. Here, charities seeking to solicit in Maryland, use the state's apparatus for regulating and, as a result, derive a benefit, namely the privilege of soliciting in Maryland where donor confidence is enhanced owing to the state's regulation of charities. But unlike the typical user fee situation, where a user's out-of-state activities are irrelevant, the out-of-state activities of the assessed charities are directly relevant to Maryland's regulatory efforts. To protect and inform her citizens, Maryland must examine the overall activities of charities, not just the charities' activities that occur within Maryland. For all these reasons, the Statute's sliding scale fee is correctly viewed as a "user fee," paid by charities for the benefits received from Maryland.

Id. at 143-44 (footnotes omitted).

The rationale for this distinction is that, where taxes are narrowly drawn to reimburse a state for its expenses, the possibility that the tax will discriminate against interstate commerce is sharply diminished.

To qualify as a user fee, a state tax must (1) reflect a fair, if imperfect, approximation of the cost of using state facilities for the taxpayer's benefit, (2) not discriminate against interstate commerce, and (3) not be excessive in relation to the costs incurred by the

taxing authorities.

Id. at 142. The Department respectfully submits that Credicorp has failed to demonstrate that this three-prong test has not been met.

First, Credicorp has failed to prove that the regulatory charges are unreasonable. As the District Court correctly noted:

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.

Opinion at 6. The number of 640 Florida residents times the \$29.95 advance annual fee equals a minimum of \$19,168 received from Florida residents. The \$200 license fee contained in section 520.32(2) Fla. Stat. (1991), amounts to about 1% of the \$29.95 advance fees received from Florida residents. This calculation does not take into account financing charges that Credicorp is charging at a rate of 12%, Opinion at 6, or profits on products sold to Florida residents from the over one thousand merchandise orders.³ Based upon the foregoing, the Department respectfully submits that there is no basis for concluding that the regulatory fees charged by the State of Florida are unfair.

Second, Chapter 520 does not discriminate against out-of-state companies in favor of in-state companies, because it requires all

³Nationwide, Creditcorp had \$1,000,000 in sales in 1992 and over \$3,000,000 in sales for the first half of 1993. Record at 213, 408.

persons no matter where they are located to be duly licensed. See Maine v. Taylor, 477 U.S. 131, 148 n.19, 106 S. Ct. 2440, 2453 n.19, 91 L.Ed.2d 110, 127 n.19 (1986) (A law is discriminatory if it is "motivated solely by a desire to protect local industries from out-of-state competition" or if it "discriminat[es] arbitrarily against interstate trade".).

Third, Credicorp has not demonstrated that the fees are excessive in relation to the costs incurred by the Department. As in Athey, the fees charged pursuant to Chapter 520 are paid by retail installment sellers for benefits received from Florida. No evidence in the record mandates a conclusion to the contrary.

Although this Court may correctly conclude that the licensing provisions of Chapter 520, Part II, Fla. Stat., do not violate interstate-commerce due to the fact that Credicorp is entering into retail installment contracts with Florida residents, the Department's case is made stronger, because Credicorp is in fact offering to compensate Florida residents to solicit business on its behalf in Florida. Record at 654, 998-99. These solicitation agreements with Florida residents are a separate but additional basis for concluding that there is no Commerce Clause violation. See Scripto, Inc. v. Carson, 362 U.S. 207, 80 S. Ct. 619, 4 L.Ed. 2d 660 (1960).

The Department respectfully submits that the Florida cases referred to on pages 9-10 of the District 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).⁴ 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. From a review of the forgoing cases, it appears that the fees imposed were "taxes" rather than "regulatory fees" and are therefore distinguishable.

The District 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 is a truth-in-lending statute and the local 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

⁴Olan Mills, Inc., relied on Spector Motor Services, 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 337. Armstrong relied on Olan Mills, Inc. Carolina Freight Carriers Corp. relied on Armstrong.

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. 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), cert denied, 425 U.S. 943, 96 S. Ct. 1684, 48 L.Ed.2d 187 (1976) (interest rate regulation); see also Quill Corp., 112 S. Ct. at 1909 ("Congress has plenary power to ... authorize state actions that burden interstate commerce").⁵ Based upon the foregoing, the Department submits that the District 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.

III.

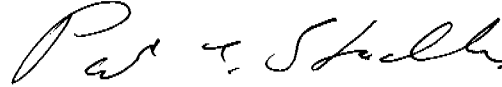
CONCLUSION

In conclusion, the Department respectfully requests that this Court hold that the Commerce Clause of the United States Constitution is not violated when the license fee requirement and the biennial renewal fee requirement of The Retail Installment

⁵See also L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 205 (6th Cir. 1985) (per curiam). But see Middle South Energy, Inc. v. Arkansas Public Service Comm'n, 772 F.2d 404, 415 (8th Cir. 1985), cert denied, 474 U.S. 1102, 106 S. Ct. 884, 88 L. Ed. 2d 919 (1986).

Sales Act, Chapter 520, Part II, Florida Statutes, are imposed upon a retail installment seller that actively solicits and sells to Florida residents on a retail installment basis, but reaches this State only by United States mail and common carrier.

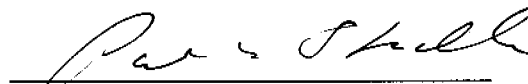
Respectfully submitted,



PAUL C. STADLER, JR.
Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399
(904) 488-9896
Fla. Bar # 335991

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 25 day of October, 1995.


PAUL C. STADLER, JR.

Service List

William E. Williams
P. O. Box 1794
Tallahassee, FL 32301

c:\wpdocs\briefs\credi6.bri

IN THE SUPREME COURT
FOR THE STATE OF FLORIDA
CASE NO. 86,601

STATE OF FLORIDA, DEPARTMENT
OF BANKING AND FINANCE,

Appellant,

v.

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.,

Appellees.

APPENDIX

1. Credicorp, Incorporated et al. v. State of Florida
Department of Banking and Finance, 1st DCA Case No. 94-440.
Exhibit A.

2. Credicorp, Incorporated et al. v. State of Florida
Department of Banking and Finance, 1st DCA Case No. 94-440, On
Motion for Certification. Exhibit B.

c:paul\cred.app

RECEIVED

JUL 18 1995

Office of General Counsel
Dept. of Banking and Finance

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.,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 94-440

Appellants,

v.

STATE OF FLORIDA, DEPARTMENT
OF BANKING AND FINANCE,

Appellee.

Opinion filed July 17, 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.

KAHN, J.

This is an appeal from a final order entered by appellee, the
Department of Banking and Finance (Department), on January 14, 1994,

EXHIBIT A

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

¹Mr. Rheinfrank died on October 25, 1993.

²Section 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.

³Section 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

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

material fact from the department.

⁴Section 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.

a loan broker; and (4) the penalty⁵ imposed is unduly harsh. We affirm in part and reverse in part the Department's final order.

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:

⁵Penalties 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.

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 sellers⁶ doing

⁶Credicorp agrees that it is a retail installment seller.

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.

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, ___ U.S. ___, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992); National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 754, 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. 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., 347 Cal. Rptr. 812 (Cal. Dist. Ct. App. 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

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

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 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. 930, 85 L. Ed. 1219 (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 (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. 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. 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. 2d 1154 (1950) (Blue Sky laws)." 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 effect, 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

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.

⁸Section 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.

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 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.

III

The Loan Broker Act

A

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.

⁹Supra, note 4.

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." 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 investment 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" 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. Publiker 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. 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, 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" adequate to fulfill Oklahoma's legitimate local purpose. 441 U.S. at 338. 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

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

¹⁰Section 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.

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 Percentage 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.

IV

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); Arpavoglou 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
W/WRITTEN OPINION.

ALLEN, J., 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, 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; Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440, 98 S. Ct. 787, 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, quoting Philadelphia v. New Jersey, 437 U.S. at 626-627; see also Hughes, 441 U.S. at 336; Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353, 97 S. Ct. 2434, 53 L. Ed. 2d 383; Pike v. Bruce Church, Inc. 397 U.S. 137, 142; 90 S. Ct. 844, 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; Philadelphia v. New Jersey, 437 U.S. at 624. 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. It is enough that the legislation merely discriminates against interstate commerce "in practical effect." Hughes, 441 U.S. at 336.

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; Pike, 397 U.S. at 142. 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, 437 U.S. at 333; Pike, 397 U.S. at 137.

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.

RECEIVED

SEP 14 1995

Office of General Counsel
Dept. of Banking and Finance

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.,

CASE NO. 94-440

Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF BANKING AND FINANCE,

Appellee.

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 certification and certify the following as a second question of great public importance passed upon by this decision:

EXHIBIT B

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.