IN THE MISSOURI SUPREME COURT

No. SC 85170

MISSOURI BANKERS ASSOCIATION, et al.

Appellants,

v.

DIRECTOR OF THE MISSOURI DIVISION OF CREDIT UNIONS, et al.

Respondents.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
HONORABLE BYRON L. KINDER

BRIEF OF AMICUS CREDIT UNION NATIONAL ASSOCIATION

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A) APPELLANTS DID NOT AND CANNOT DEMONSTRATE THAT THEY ARE ACTUALLY COMPETITORS OF THE RESPONDENT CREDIT UNION;

B) APPELLANTS DID NOT AND CANNOT DEMONSTRATE ANY HARM TO ANY BANK IN MISSOURI, INCLUDING APPELLANT CENTURY BANK FROM THE DECISION GRANTING EXPANDED FIELD OF MEMBERSHIP TO RESPONDENT CREDIT UNION; AND

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JURISDICTIONAL STATEMENT

Amicus Credit Union National Association adopts the jurisdictional statement of Springfield Telephone Employees Credit Union, Respondents herein. Amicus Credit Union National Association files this Brief with consent of all parties to the current appeal.

STANDARD OF REVIEW

Amicus Credit Union National Association adopts the statement of the standard of review of Springfield Telephone Employees Credit Union, Respondents herein.

STATEMENT OF FACTS

Amicus Credit Union National Association adopts the Statement of Facts of Respondent Springfield Telephone Employees Credit Union (herein "STECU") with the addition of the following:

During the hearing before the Credit Union Commission a witness on behalf of Appellants, Missouri Bankers Association and Century Bank, testified that there was no evidence of actual competition between any specific credit union and any bank in Missouri; the only evidence testified to by any of Appellants' witnesses related to a Credit Union in Mountain Home, Arkansas. (L.F. 161). This Arkansas Credit Union was the Credit Union of Baxter International, in Mountain Home, Arkansas.[1] *Id.* Apparently several employees of Baxter International had moved their accounts from Century Bank to this Credit Union. *Id.*

[1] The credit union referred to in the testimony is actually the Baxter Credit Union, an Illinois credit union based in Vernon Hills, Illinois, which has an office in Mountain Home, Arkansas. The references to the Credit Union of Baxter International is solely in keeping with the text of the testimony and refers to Baxter Credit Union hereinafter.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS CASE FOR LACK OF STANDING, IN THAT APPELLANTS FAILED TO CARRY THEIR BURDEN TO DEMONSTRATE THAT THEY WERE AGGRIEVED, EVEN ASSUMING THAT ECONOMIC COMPETITORS MAY BE AGGRIEVED PARTIES, BECAUSE:

A) APPELLANTS DID NOT AND CANNOT DEMONSTRATE THAT THEY ARE ACTUALLY COMPETITORS OF THE RESPONDENT CREDIT UNION;

B) APPELLANTS DID NOT AND CANNOT DEMONSTRATE ANY HARM TO ANY BANK IN MISSOURI, INCLUDING APPELLANT CENTURY BANK FROM THE DECISION GRANTING EXPANDED FIELD OF MEMBERSHIP TO RESPONDENT CREDIT UNION; AND

C) BANKS AND CREDIT UNIONS ARE NOT ECONOMIC COMPETITORS IN MISSOURI.

Section 370.081, RSMo 2000

Harris v. Union Electric Co., 685 S.W.2d 607 (Mo. App. E.D. 1985)

ARGUMENT

INTRODUCTION

In Missouri, standing to challenge the decision of an administrative body requires more than just an assertion that standing exists. A determination of standing first requires an evaluation of the statutes under which standing is alleged to be granted. If no such statute exists, standing may only be allowed upon a showing of a legally protected right which will be actually adversely affected by the administrative decision. Appellants consistently refer to federal law; however, this case arises solely out of a Missouri statutory procedure and thus Missouri law controls the analysis of standing.

In the current matter, Appellants assert that their standing to challenge the decision of the Respondent Credit Union Commission is based on Section 370.081.5, RSMo, 2000, which states in relevant part that:[2]

> Any party who is aggrieved by a final decision of the Commission entered pursuant to this subsection and who has exhausted all administrative remedies provided by law may appeal the decision to the Circuit Court of Cole County.

Appellants argue that they are "aggrieved" under this statute. That assertion hinges on two points: first, that by simply having "claimed" an interest in the underlying proceeding, they are now aggrieved; and second, that they are economic competitors of the Respondent STECU,

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[2] All statutory citations are to RSMo. 2000 unless otherwise so noted.

whose expansion adversely affects their competitive economic position. The first argument has been addressed by Respondents' Briefs and Amicus adopts the Brief of STECU on this point. With respect to the second argument, Amicus CUNA will address the issue of alleged competition between credit unions and banks, and whether standing should be authorized to such economic competitors as Appellants allege themselves to be.

I.

THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS CASE FOR LACK OF STANDING, IN THAT APPELLANTS FAILED TO CARRY THEIR BURDEN TO DEMONSTRATE THAT THEY WERE AGGRIEVED, EVEN ASSUMING THAT ECONOMIC COMPETITORS MAY BE AGGRIEVED PARTIES, BECAUSE:

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C) BANKS AND CREDIT UNIONS ARE NOT ECONOMIC COMPETITORS IN MISSOURI.

Standing to challenge a decision of the Credit Union Commission must be based upon the language in §370.081.5. Appellants' argue that the "zone of interest" test is the applicable standard to determine whether they are authorized to appeal the decision of the State Credit

Union Commission, authorizing geographic expansion of a credit union. The "zone of interest" test is not to be used where standing is governed by a specific statute, as "the right of appeal exists solely by statute." *HHC Medical Group P.C. v. City of Creve Coeur Board of Adjustment*, 99 S.W.3d 68, 72 (Mo. App. E.D. 2003). Because a specific statute also will always prevail over a statute of a general nature on the same subject, see, *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996) and *Flarsheim v. Twenty Five Thirty Two Broadway Corp.*, 432 S.W.2d 245 (Mo. 1968), a specific statute on a specific subject, indicates the General Assembly's intent that it be exclusive. *Randalls v. Schaffner*, 485 S.W.2d 1 (Mo. 1972).

Section 370.081 grants standing only to a party who is aggrieved by the decision of the Credit Union Commission. The only question necessary to decide is whether the Appellants are "aggrieved" within the meaning of that term as used in the statute. As demonstrated by the opinion of the Court of Appeals below, the only reasonable answer is that they are not. To demonstrate standing as an aggrieved party, Appellants must carry the burden of showing "aggrievement." In this case, Appellants assert standing solely as competitors of Respondent STECU for financial services business in a geographic area.[3] However, the Appellants offer

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[3] Amicus CUNA fully agrees that Missouri does not authorize mere economic competitors to have standing to challenge decisions of governmental agencies, and specifically decisions of the Missouri Credit Union Commission. Respondent STECU has fully and thoroughly briefed this issue, and CUNA strongly urges this Court to adopt the

no evidence whatsoever to support the assertion that they are in actual (or even hypothetical) competition in any real economic sense. Appellants cannot manufacture their own standing by resting on mere assertions, but must at least show facts evidencing that they are actual competitors and that they are harmed (or aggrieved) by the decision of the Commission. Otherwise, the requirement of standing becomes meaningless.

A mere assertion does not demonstrate, as is required to show standing, that the actual effect on Appellants is "immediate...and not [merely a] possibility of ... remote repercussions." *Calarosa v. Stovall*, 32 S.W.3d 138, 141 (Mo. App. W.D. 2000).

Appellants have not met their evidentiary burden, even though they were granted a full hearing before the Credit Union Commission to do so. Accordingly, on this basis alone this Court should affirm the trial court's decision that the Appellants do not have standing to appeal the decision of the Credit Union Commission.

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position set forth in STECU's Brief on this issue.

A)

APPELLANTS DID NOT AND CANNOT DEMONSTRATE THAT THEY ARE ACTUALLY COMPETITORS OF THE RESPONDENT CREDIT UNION

In order to reach the question whether a competitor has standing, the determination must first be made as to whether there is in fact competition between the parties. It would be incongruous for "non-competitors" who are otherwise not aggrieved to have a right to challenge the action of an administrative body, like the Credit Union Commission. Similarly, when claiming to have standing as a competitor, Appellants must make a showing of their entitlement to claim that status and that status should not be presumed to exist..

Under all traditional tests of standing, even if there is a possibility that credit unions and banks could be competitors, it is still incumbent upon the Appellant Bank challenging the decision of the Credit Union Commission to show that it has been, is, or will be a competitor of this Missouri credit union. Such evidence and showing of competition between the parties requires more than just a bare assertion that Century Bank is a competitor.

This Court has repeatedly held that to be an "aggrieved person" a person must demonstrate their standing as such. See e.g., *Hertz Corporation v. State Tax Commission*, 528 S.W.2d 952, 954 (Mo. banc 1975). This burden of proof is squarely upon the party asserting "aggrievement." The Appellants must factually demonstrate that they are "aggrieved." Appellants Century Bank and Missouri Bankers Association have not made such a showing through the course of a full administrative contested case proceeding and two levels of judicial

review. This Court, on this record, must conclude that Appellants have not and apparently cannot demonstrate that they qualify for even the competitor standing they assert.

B)

APPELLANTS DID NOT AND CANNOT DEMONSTRATE ANY HARM TO ANY BANK IN MISSOURI, INCLUDING APPELLANT CENTURY BANK, FROM THE DECISION GRANTING EXPANDED FIELD OF MEMBERSHIP TO RESPONDENT CREDIT UNION

The President of Century Bank, John Harlin, testified before the Credit Union Commission. (L.F. 158-166.) Mr. Harlin testified extensively about Century Bank's actions, operations and history. He did not at any point testify that there was any effective competition between Century Bank and any Missouri credit union. In fact, his testimony was quite the opposite. Upon inquiry, the only credit union Mr. Harlin could identify that had ever taken a single customer from his bank was actually a credit union operating in Arkansas, The Credit Union of Baxter International. (L.F. 161.) Further, he testified that to the best of his knowledge, since the new credit union laws allowing expansion became effective, he has not lost any business to any credit union in the State of Missouri. *Id*. Under the evidence of record in this case, Century Bank must at least demonstrate that they are in competition with

a Missouri credit union.[4] Century Bank has instead established it is not in competition with Missouri credit unions, and has no reason to even believe it is in competition with STECU.

Therefore, the Century Bank, even if it could theoretically be a competitor of STECU; and even if it could theoretically have standing as an aggrieved party if it is a competitor, (both of which contentions Amicus firmly denies), has not carried its burden to demonstrate by evidence that it is a competitor with STECU for purposes of standing in this case. Century Bank had abundant opportunity to make its record on standing, but it has completely and utterly failed to demonstrate the slightest concrete evidence of competition between itself and **any** Missouri credit union. Moreover, there is no evidence whatsoever of competition between itself and the Springfield Telephone Employees Credit Union, presently or with an expanded field of membership.

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[4] Competition, if that is the appropriate term, between Century Bank and a credit union operating in Arkansas cannot support Appellants' assertion of competition between Century Bank and STECU. The credit union laws of the State of Arkansas are different than those of the State of Missouri, just as the federal credit union laws are significantly different than the credit union laws of the State of Missouri. The Credit Union Commission has no power to protect Century Bank from credit unions in Arkansas. The testimony of Mr. Harlin that he believes he lost customers to a credit union operating in Arkansas is not competent evidence to show competition with any Missouri credit union.

Century's failure to demonstrate competition with any Missouri credit union, or that it will be in competition with STECU, and that any such competition has or will harm a legally protected or protectable interest of Century Bank, leaves this Court to rule on pure speculation. As a result, this Court should affirm the decision of the Western District Court of Appeals and the Circuit Court of Cole County, and hold that Appellant Century Bank has no standing to seek judicial review of the decision of the Credit Union Commission in the current matter as an aggrieved party.

Just as Century Bank must be required to demonstrate that it is or will be in competition with STECU; and that such competition is or will be actually harmful, so must the Appellant Missouri Bankers Association show that it has a member or members that are or will be in competition with STECU and suffer harm as a result.

The Missouri Bankers Association addressed this issue of standing and presented its evidence before the Credit Union Commission by the testimony of Max Cook, the President and CEO of the Missouri Bankers Association. During Mr. Cook's testimony, he could not identify any person, much less any customer, of any of his member banks, who would join the Springfield Telephone Employees Credit Union if the expansion of membership occurred. (L.F. 169.) In fact, Mr. Cook specifically agreed he "can only speculate" as to what, if any, competition might exist between banks and credit unions. *Id.* Mr. Cook testified that across the entire State of Missouri, since the 1998 Credit Union Act was enacted, not a single bank has failed. (L.F. 170.) Indeed, there have been numerous new bank charters issued in the geographic area around the Springfield Telephone Employees Credit Union. (L.F. 171.) There

was no testimony that any Missouri bank lost any customers to STECU or to any other Missouri credit union in the Springfield area. It is respectfully suggested by Amicus Curiae that this is far from the kind of adverse "immediate effect" that is required to show that a party is "aggrieved." *Harris v. Union Electric Co.,* 685 S.W.2d 607,611 (Mo. App. E.D. 1985). If anything, the testimony of both Appellants together demonstrates that any competition from STECU would be, at most, "merely a possible remote consequence." *Id.* Moreover, no economic harm can even be imagined, much less quantified.

This Court's decisions in *Hertz Corporation* and *Missouri Health Care Association v. Attorney General*, 953 S.W.2d 617 (Mo. banc 1997) place the burden upon the Missouri Bankers Association to show that its members are going to be subject to competition from STECU and that such competition will cause injury in fact. A mere assertion of such competition and harm, without facts or evidence to back it up, cannot be sufficient to allow standing to these Appellants.

At best, the Missouri Bankers Association asserts that it believes that it and its members might see some type of competition if STECU expands its field of membership to serve more Missourians. Such argument is precisely what Courts have rejected as granting a party standing: For the harm or "injury in fact" which gives rise to legal standing cannot be "merely a possible remote consequence." *City of Eureka v. Litz,* 658 S.W.2d 519, 522 (Mo. App. E.D. 1983).

For standing to seek judicial review under Section 370.081.5, RSMo, there must be some showing of aggrieved status. The Missouri Bankers Association has not made such a

showing when given the opportunity at hearing to do so. This failure of proof of a jurisdictional matter dictates this Court should find that MBA lacks standing to challenge the decision of the Credit Union Commission in this case.

Accordingly, this Court should affirm the decision of the Western District Court of Appeals and the Circuit Court of Cole County and find that the Missouri Bankers Association has no standing to challenge the decision of the Missouri Credit Union Commission in this case.

C)

BANKS AND CREDIT UNIONS ARE NOT ECONOMIC COMPETITORS IN MISSOURI

Not only has there been no evidence presented in this case to demonstrate that Appellants are in competition with Respondent STECU, or that banks are in competition with

credit unions generally, but the reality is that credit unions and banks in Missouri[5] are not competitors. Banks and credit unions serve separate functions within the economy.

This lack of competition is evident on a number of levels. First, there is size. The official Federal Deposit Insurance Corporation, Summary of Deposits report demonstrates the vast difference in size between banks and credit unions. For example, in Missouri alone, in the two years ending June, 2002, **growth** in the total amount of deposits held by banks was $7 billion. See Summary of Deposits, Federal Deposit Insurance Corporation (June 30, 2002). The total amount of deposits (not growth in deposits) in all credit unions in the State of Missouri in the same period was only $6.2 billion. 2002 Midyear Statistics for Federally Insured Credit Unions, National Credit Union Administration (June 30, 2002). In other words, all of the deposits in all of the credit unions across the State of Missouri, do not even amount

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[5] It is important to recognize that there are significant differences between Missouri credit unions and banks, and federally chartered credit unions and banks. The statutory and regulatory schemes are significantly different. For example, state credit union statutes allow hybrid fields of membership, combining geographical and occupational fields, but federal credit union statutes do not. See e.g. *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998). These differences are so significant that any suggestion of an analysis of the state law issues in this case utilizing federal credit unions and national bank statutes or regulatory schemes is not just irrelevant but patently misleading.

to the growth that the deposits in banks in the State of Missouri saw in this small two year period. The total amount of deposits contained in banks so dwarfs the amount of deposits in credit unions as to demonstrate that there is no competition between banks and credit unions, which could ever adversely affect banks in an economic sense.

Moreover, credit unions are by statute owned solely by their own members. The provisions of Chapter 370, which relate to credit unions, establish an entirely different structure than the statutes which relate to banks. For example, Section 370.080 establishes criteria for membership within credit unions, while banks have no restrictions whatsoever upon who may be depositors and who may be owners of a bank. A bank is specifically designed to generate profits for its owners; a credit union is designed to be a collaborative and cooperative effort by the members to serve the members without profit motive.

Most importantly, the statutory schemes for credit unions and banks not only have vastly differing requirement effects, constraints, and applications, but they also reflect a totally different intent of the legislature. The laws demonstrate that the Missouri General Assembly views banks and credit unions not as being competitors, but as each filling its own specific and separate role in the state's financial marketplace. The contention of "economic competition," fundamental to Appellants' arguments for judicial standing to attack the regulation of credit unions, is a cannard. Appellants have no standing in this case.

CONCLUSION

Under the provisions of Section 370.081.5, only an aggrieved party may appeal for judicial review of a decision of the Credit Union Commission. The Appellants Century Bank and Missouri Bankers Association do not qualify in any regard as aggrieved parties. The burden is upon the party claiming standing to demonstrate that they are so aggrieved. Neither Century Bank nor the Missouri Bankers Association has demonstrated that they are legally aggrieved. Accordingly, they can have no standing in court to challenge the decision of the Credit Union Commission.

Thus, the decision of the Western District Court of Appeals and the trial court should be affirmed.

Respectfully submitted,

By: _____

Eric L. Richard, General Counsel
Credit Union National Association

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 3786 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief was sent U.S. Mail, postage prepaid, to, the following on this 2nd day of July, 2003:

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