IN THE SUPREME COURT OF MISSOURI

Case No. 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

SUBSTITUTE BRIEF OF RESPONDENT SPRINGFIELD TELEPHONE EMPLOYEES CREDIT UNION, n/k/a TELCOMM CREDIT UNION, INTERVENOR

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JURISDICTIONAL STATEMENT

The Court has jurisdiction of this matter under Article V, Section 10 of the Missouri Constitution and Supreme Court Rule 83.04, pursuant to its order transferring the appeal after opinion of the Missouri Court of Appeals Western District.

The matter originated as an administrative appeal by the Missouri Bankers Association ("MBA") and Century Bank of the Ozarks ("Century Bank") following a decision of the Director of the Missouri Division of Credit Unions granting Springfield Telephone Employees Credit Union ("STECU") the authority to operate as a community credit union with a field of membership that included the 417 area code geographic area. L.F. 26. Following a contested case hearing before the Credit Union Commission, the Director's decision was affirmed. L.F. 36.

MBA and Century Bank filed a multi-count petition in the Circuit Court of Cole County which joined two claims for judicial review of the Credit Union Commission's decision with claims for mandamus and declaratory relief. L.F. 7. A motion to dismiss was filed by STECU as to all counts on the grounds that MBA and Century Bank lacked standing either as alleged competitors or as taxpayers to challenge the decision of the administrative agency. L.F. 47-48. The Circuit Court granted the motion to dismiss, holding that MBA and Century Bank could not maintain the action either as a competitor or as a taxpayer. L.F. 128-137.

MBA and Century Bank then filed an appeal with the Missouri Court of Appeals Western District, challenging only the Circuit Court's holding as to lack of competitor standing and abandoning any claim of lower court error on the issue of taxpayer standing.

L.F. 138-142. Following briefing and oral argument, the Court of Appeals affirmed the Circuit Court's dismissal of the action. Court of Appeals Opinion. The Court of Appeals held that MBA and Century Bank lacked standing under §370.081.5, RSMo., to seek judicial review of the Credit Union Commission's decision since they were not "aggrieved" by that decision and lacked standing as to all the other claims in their action because the right to be free from competition was not a legally cognizable right in Missouri. *Id.*

Following that opinion and the denial of post-opinion motions at the Court of Appeals level, MBA and Century Bank applied for transfer to this Court. The application was granted and the matter transferred to this Court.

STATEMENT OF FACTS

The genesis of this action was the filing of an application and business plan with the Missouri Director of Credit Unions ("Director") on July 18, 2000, for conversion of the Springfield Telephone Employees Credit Union ("STECU") from a selected employee group (or common bond) credit union to a community credit union. [L.F. 27] At the time of the application, STECU's membership was comprised of members who shared a common occupation, association or employer. [L.F. 27] Through its application, it was seeking to convert its membership base to one that would consist of members throughout a specific area comprising the 417 area code and part of the 573 telephone area code. [L.F. 27]

Because the Director determined that the conversion might encompass a membership group in excess of 3,000 persons, the application was forwarded to the Credit Union Commission ("CUCOM") as part of the normal administrative process for a determination of whether an exemption from the 3,000 person group limit should be granted. [L.F. 27-28] CUCOM held a hearing on the exemption issue and, after consideration of all the information provided to it, granted the exemption on August 3, 2000. [L.F. 28] The matter then went back to the Director for completion of the administrative process to review the application, the business plan and the most recent financial examination of STECU to determine if the conversion should be allowed. [L.F. 28]

The Director issued his determination on October 3, 2000. [L.F. 28] In that determination, the Director granted the application as respects the request to be a

community credit union serving the 417 area code area, but denied the request to serve portions of the 573 area code area. [L.F. 28-29] In approving STECU's request to serve the 417 area code area, the Director determined that STECU possessed the administrative capability and financial resources to serve the 417 area code geographic area; that the 417 area code area was an area which could be served by a community credit union under §370.080.2; and that STECU was operating in a safe and sound manner and was adequately capitalized for the expansion. [L.F. 29]

Subsequent to that decision, Century Bank of the Ozarks ("Century Bank") and the Missouri Bankers Association ("MBA") sought administrative review of the decision by CUCOM. [L.F. 30] After an evidentiary hearing on the matter, [L.F. 145-80], CUCOM entered its decision finding that the Director's decision was not arbitrary or capricious and was based solely on evidence in the Director's possession. [L.F. 36]

Century Bank and MBA challenged CUCOM's decision by filing a multi-count petition in the Circuit Court of Cole County. [L.F. 7] They joined their request for judicial review of the decision with claims for judicial review of a non-contested case, mandamus, and a declaratory judgment concerning the validity of 4 CSR 105-3.010(1). [L.F. 7-25] The Circuit Court dismissed the action holding that Century Bank and MBA lacked standing on all counts because they were mere competitors of STECU and had no cognizable legal interest to protect or enforce in the action. [L.F. 128-135]

Much of the evidence presented at the evidentiary hearing before CUCOM focused on the standing issue. Credit unions are cooperatives that exist primarily to accept shares and deposits and make loans to their members. [L.F. 174] The credit union

is owned by its depositors. [L.F. 168] Banks have shareholders who are investors in the business and not necessarily depositors or customers of the bank. [L.F. 168] The motive of credit unions to serve the members of the cooperative is different from the motive of a bank. Banks exist to make a profit for their members. [L.F. 168, 174] Generally, a credit union may draw its members from the same population as would banks, but the credit union is more limited in the persons with whom it can deal because it will have a specific population from which its members may come. [L.F. 174] The services of a bank, in contrast, can be accessed by anyone, anywhere. [L.F. 174] Regulation of the banks and credit unions is also separate. [L.F. 168] Credit unions are regulated by the Director and Credit Union Commission. [L.F. 168] The Bank Board, on the other hand, regulates banks. [L.F. 168] The regulation of banks specifically extends as well to the regulation of competition between banks. [L.F. 168] The Credit Union Commission has no control over the competition faced by banks. [L.F. 168]

Century Bank is a community bank with its main facility in Gainesville, Missouri, and offices in Theodosia (Ozark County), Bakersfield (Ozark County) and Ava (Douglas County). [L.F. 158] Its principal business consists of consumer depositors and borrowers, with residential real estate as part of its portfolio. [L.F. 158] Most of its business is transacted within the counties of Ozark and Douglas. [L.F. 160] Within its business area there are people that travel daily to Springfield to work. [L.F. 164]

Century Bank has never lost any business to a community credit union in Missouri or from the geographic area comprising the 417 area code. [L.F. 161] There is no credit union currently operating from Missouri in the area and Century Bank could not say what

effect a credit union entering the market would have on the bank or its business. [L.F. 162] Nor could it point to any study or facts that would show how much business, if any, banks were losing to credit unions. [L.F. 161] None of its customer has suggested that they would switch their business to a credit union if one would come into the area. [L.F. 162] It was only a possibility that a credit union moving into the area would take business from the bank. [L.F. 162] In addition, Century Bank did not know whether STECU planned to open an office in the areas served by Century Bank but believed it would not be economically feasible for STECU to do so given the number of financial institutions already in the area. [L.F. 165] The only business it ever lost to a credit union went to a credit union located in Arkansas which was associated with the largest employer in the area. [L.F. 161, 164]

Century Bank is concerned that a credit union entering its market would compete with it for the deposits and loan demand in its area of operations. [L.F. 161, 162] However, if another bank came into the area to compete for its business, that would be a good thing, even though other banks moving into the area in the past had taken deposits and loan business from it. [L.F. 162] In fact, when another bank moved into the area, Century Bank took affirmative actions to make itself more competitive, [L.F. 165], and was still able to expand by acquiring another branch. [L.F. 164-65]

The testimony from the MBA was more generalized in nature on the question of competition. MBA has 88 member banks and savings and loans which are located in the 417 area code area; however, it was not indicated how many of these were located outside of the Springfield area where STECU is currently located. [L.F. 169, 170] Of

these 88 institutions, three or four voiced concern over STECU's application and one (Century Bank) was involved in the challenge to the Director's and CUCOM's decisions. [L.F. 170] Century Bank was in the action because the MBA had determined that Century Bank would be all that was necessary to represent the various impacts that might occur if STECU's application was granted. [L.F. 169]

In terms of activities and the breadth and scope of products and services, banks and savings and loans are migrating closer together with credit unions maintaining some differences. [L.F. 166] Traditional deposits are now migrating out of commercial banks, savings and loans and other financial institutions and into such things as brokerage houses and insurance companies with their annuity products. [L.F. 167, 171] However, the banks have taken actions to make themselves more competitive with these other financial market competitors. [L.F. 171] One principal way the banking industry has sought to overcome the advantages that other financial institutions have is through lobbying efforts that produce legislation that, in the banking interests' view, "levels the playing field." [L.F. 171]

What concerns the MBA about credit unions is not their competition, but some of the perceived advantages granted to them by legislative action. In the opinion of MBA, competition between credit unions and banks is not unfair. [L.F. 168] At the same time, MBA believes that credit unions enjoy the advantage of not having to pay federal and state corporate income taxes or federal or state income taxes. [L.F. 167] Notwithstanding what MAB views as a legislative-granted advantage, a credit union has never been the sole cause of a bank going out of business. [L.F. 170] Since the credit

union statute was amended in 1998, there have been no bank failures in Missouri and the 417 area code. [L.F. 170] In that same period, 13 new banks were chartered in Missouri, many of them in the 417 area code. [L.F. 171] No new credit unions were chartered during the same period, although there was one conversion from a federal to a state credit union in that period. [L.F. 177]

POINTS RELIED ON

I.

THE CIRCUIT COURT WAS CORRECT IN ITS DISMISSAL OF APPELLANTS' REQUEST FOR JUDICIAL REVIEW BECAUSE THEY LACKED STANDING TO SEEK SUCH REVIEW IN THAT:

A. APPELLANTS WERE NOT AGGRIEVED BY THE DECISION OF THE MISSOURI CREDIT UNION COMMISSION AND, THUS, NOT ONE OF THE PARTIES WHO WAS AUTHORIZED TO SEEK JUDICIAL REVIEW UNDER §370.081.5, RSMO.; AND

B. APPELLANTS LACKED ANY LEGALLY COGNIZABLE RIGHT TO PROTECT OR ENFORCE SINCE THEY WERE POTENTIAL COMPETITORS OF STECU AND WERE ONLY CHALLENGING THE CREDIT UNION COMMISSION'S ACTION TO BE FREE FROM STECU'S COMPETITION; AND

C. APPELLANTS WERE NEITHER AN INTENDED BENEFICIARY OF §370.080.2(2), NOR WITHIN THE ZONE OF INTERESTS SOUGHT TO BE PROTECTED BY THAT SECTION.

Community Care Centers, Inc. v. Missouri Health Facilities Review Committee, 735 S.W.2d 13 (Mo. App. W.D. 1987).

City of Eureka v. Litz, 658 S.W.2d 519 (Mo. App. E.D. 1983).

§370.081.5, RSMo.

II.

THE CIRCUIT COURT WAS CORRECT IN ITS DISMISSAL OF APPELLANTS' REQUEST FOR NON-CONTESTED CASE JUDICIAL REVIEW OF THE CREDIT UNION COMMISSION'S GRANT OF AN EXEMPTION FROM THE 3,000 MEMBERSHIP GROUP PROVISION OF §370.081.2, RSMO., (COUNTS II & III) BECAUSE THE APPELLANTS LACKED STANDING TO MAINTAIN SUCH AN ACTION IN THAT (A) THEY LACK ANY COGNIZABLE LEGAL INTEREST TO BE FREE FROM ECONOMIC COMPETITION FROM CREDIT UNIONS, INCLUDING ANY PERCEIVED RIGHT TO BE FREE FROM "ILLEGITIMATE COMPETITION" AND (B) APPELLANTS ARE NEITHER INTENDED BENEFICIARIES OF FIELD OF MEMBERSHIP PROVISIONS IN THE CREDIT UNION STATUTE NOR ARE THEY WITHIN THE ZONE OF INTERESTS PROTECTED BY §370.081.2, RSMO.

Querry v. State Highway and Transportation Commission, 60 S.W.3d 630 (Mo. App. W.D. 2001).

Farmer's Bank of Antonia v. Kostman, 577 S.W.2d 915 (Mo. App. 1979)

Missouri Health Care Association v. Missouri Health Facilities Review Committee, 777 S.W.2d 241 (Mo. App. W.D. 1989)

§536.150, RSMo.

III.

THE CIRCUIT COURT DID NOT ERR IN DISMISSING COUNT IV OF THE PETITION CHALLENGING THE VALIDITY OF 4 CSR 105-3.010(1) BECAUSE CENTURY BANK AND MBA LACKED STANDING TO CHALLENGE THE RULE UNDER §§536.050 & 536.053, RSMO., IN THAT THE SAME REQUIREMENTS OF STANDING TO MAINTAIN AN ACTION IN CIRCUIT COURT PERTAIN TO ALL OF APPELLANTS' PETITION REGARDLESS OF THE FORM OF ACTION AND APPELLANTS ARE NOT, AS A MATTER OF LAW OR FACT, AGGRIEVED FOR THE PURPOSE OF MAINTAINING A DECLARATORY JUDGMENT ACTION PURSUANT TO CHAPTER 536, RSMo.

Group Health Plan, Inc. v. State Board of Registration for the Healing Arts, 787 S.W.2d 745 (Mo. App. E.D. 1990).

Querry v. State Highway and Transportation Commission, 60 S.W.3d 630, 634 (Mo. App. W.D. 2001).

§536.050, RSMo.

§536.053, RSMo.

IV.

THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE CLAIMS OF THE MISSOURI BANKERS ASSOCIATION FOR LACK OF ASSOCIATIONAL STANDING TO MAINTAIN A PETITION FOR REVIEW OF AGENCY ACTION BECAUSE MBA FAILS THE TEST FOR STANDING AS AN ASSOCIATION REPRESENTING THE INTERESTS OF ITS MEMBERS, IN THAT NO MEMBER OF MBA HAS BEEN SHOWN TO HAVE STANDING TO BRING THIS ACTION IN SUCH MEMBER'S OWN RIGHT; MBA AND ITS MEMBERS LACK ANY LEGALLY RECOGNIZED INTEREST PROTECTED BY LAW WHICH IS CAPABLE OF BEING PROTECTED UNDER CHAPTER 370, RSMo; AND BECAUSE PARTICIPATION OF THE INDIVIDUAL MEMBERS CLAIMING ECONOMIC INJURY IS REQUIRED TO ESTABLISH THE ASSERTED INTEREST OF MBA MEMBERS IN BEING FREE FROM INJURY CAUSED BY ECONOMIC COMPETITION FROM CREDIT UNIONS.

Missouri Outdoor Advertising Association, Inc. v. Missouri State Highways and Transportation Commission, 826 S.W.2d 342 (Mo. banc 1992).

Missouri National Education Ass'n v. Missouri State Board of Education, 34 S.W.2d 266 (Mo. App. W.D. 2000).

Home Builders Association of Greater St. Louis, Inc. v. City of Wildwood, 32 S.W.3d 612 (Mo. App. E.D. 2000).

ARGUMENT

I.

THE CIRCUIT COURT WAS CORRECT IN ITS DISMISSAL OF APPELLANTS' REQUEST FOR JUDICIAL REVIEW BECAUSE THEY LACKED STANDING TO SEEK SUCH REVIEW IN THAT:

A. APPELLANTS WERE NOT AGGRIEVED BY THE DECISION OF THE MISSOURI CREDIT UNION COMMISSION AND, THUS, NOT ONE OF THE PARTIES WHO WAS AUTHORIZED TO SEEK JUDICIAL REVIEW UNDER §370.081.5, RSMO.; AND

Standard of review. The review of a litigant's standing to pursue a claim is *de novo* and no deference is given to the trial court's decision. *Home Builders Association of Greater St. Louis v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. App. E.D. 2000). Both the petition and any other non-contested facts (in this case, the uncontested facts adduced at the administrative hearing) are accepted as true. *Id.* Standing is then determined as a matter of law on the basis of those facts. *Id.*

Argument. Century Bank has never lost any business to a community credit union, no matter how the credit union's geographic area of service is defined, nor could Century Bank say what effect any such credit union entering its market area would have on the bank or its business. [L.F. 161, 162] No customer of Century Bank has threatened to move its business to any credit union that might move into the area and it was the bank's view that it would not be economically feasible for STECU to open an office in

the area served by Century Bank. [L.F. 162, 165] At best, Century Bank suffers from pure supposition that a credit union operating within its area would be another competitor in its area for deposits and loans. [L.F. 161, 162] Ironically, Century Bank is not concerned with competition *per se* from other financial institutions moving into its area, as it views new banks moving into its area as healthy. [L.F. 162] Instead, its objection appears merely to be competition from credit unions. Indeed, as the testimony of the MBA suggested, Century Bank's purpose in the lawsuit is less to protect its own selfish interest in keeping competitors out of its market area and more to serve as a straw man for the MBA and the banking industry in their attempts to interpose themselves into the regulation of the credit union industry and to accomplish through administrative and judicial process what it has failed to accomplish through the legislative process. [L.F. 169]

Notwithstanding such tenuous and speculative actual injuries to Century Bank, in particular, and the members of the MBA, in general, these two parties seek to challenge, impede, delay and discourage the Director in the performance of his duties and STECU in the provision of credit union services to its members and potential members. Century Bank and MBA sought judicial review of CUCOM's decision approving the Director's grant of authority to STECU to operate as a community credit union serving persons who reside within the geographic area of the 417 area code under §370.081.5, RSMo.

The problem with the attempt to intermeddle in the scheme of credit union regulation by these two parties is that they misinterpret the statute and attempt to bootstrap a more liberal grant of administrative review under §370.081.5 into the narrower grant of judicial review also

allowed under that section. As a review of the plain language of that section shows, the legislative grant of authority to challenge the administrative decisions of the Director differs markedly between those who may seek administrative review of a decision and those who may seek judicial review of a decision. The relevant part of the statute provides:

> Within fifteen days after the decision is published in the Missouri Register, any person or entity claiming to be adversely affected shall have the right to contest the decision by appealing the decision to the credit union commission utilizing the procedure as set out in section 370.063. If the commission finds that the decision or the findings of the director of the division of credit unions was arbitrary and capricious or not based on evidence in the director's possession, the commission shall set aside the findings and decision of the director of the division of credit unions and shall enter its own findings and decision. 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.

§370.081.5, RSMo.

Section 370.081.5 has two thresholds which must be met, each of which applies separately to different stages in the review process and each of which is qualitatively different from the other. To obtain administrative review, a person need only claim to be "adversely affected." *Id.* On the other hand, to obtain judicial review, the person seeking that level of review must be "aggrieved" by the decision of CUCOM. *Id.* The circuit

court determined that Century Bank and MBA lacked standing to seek judicial review of the decision of CUCOM. Thus, it is the "aggrieved" standard applicable to judicial review which must measure the standing of these two parties.

The bank parties recognize that they are not "aggrieved" as that term has been construed under Missouri law since time *in memoriam.* Instead, they ask this Court to make exception for this one instance and to adopt a much broader definition that means "suffering, grief, distress" and "a cause of uneasiness or distress felt to afford rightful reason for reproach, complaint or resistance." Substitute Brief of Appellants at 25-26. Under the banks' interpretation, they have been aggrieved by the decision of CUCOM because they are "uneasy" about the competition that might result from the entry of a credit union into their market area and, thus, should be afforded the ability to interfere in the administrative/regulatory process to ease their bad feelings. The term "aggrieved" has never, and should never, be interpreted in such a broad and unlimited manner.

The traditional and long followed definition of "aggrieved" adopted by the courts of this state in the context of standing is:

> To qualify as aggrieved persons, plaintiffs must demonstrate a specific and legally cognizable interest in the subject matter of the administrative decision and that the decision will have a direct and substantial impact on that interest. The decision must operate prejudicially and directly upon plaintiffs' personal or property rights or interests and such must be immediate and not merely a possible remote consequence.

City of Eureka v. Litz, 658 S.W.2d 519, 522 (Mo. App. E.D. 1983)(citations omitted). *See, also, Hertz Corporation v. State Tax Commission*, 528 S.W.2d 952, 954 (Mo. banc 1975). Key to this definition of standing is a legally cognizable right, i.e., one that the law recognizes and will enforce.

The right to suppress or stifle competition is not one that the law recognizes and enforces. *Community Care Centers, Inc. v. Missouri Health Facilities Review Committee*, 735 S.W.2d 13, 15 (Mo. App. W.D. 1987); *Schmitt v. City of Hazelwood*, 487 S.W.2d 882 (Mo. App. 1972). As *Community Care Centers* pointed out, this doctrine "is neither new nor limited to the health care field." 735 S.W.2d at 15. In *St. Joseph's Hill Infirmary, Inc. v. Mandl*, 682 S.W.2d 821, 826 (Mo. App. E.D. 1984), the court further expounded on why the right to be free of competition or an interest in preventing competition was not a legally enforceable one: "The purpose of restricting competition through licensing is to benefit the public generally, not to protect the rights or interests of the regulated companies. As such, competitors may be the beneficiaries of the licensing procedures but those procedures do not directly affect their 'private rights'."

Simply put, and in words suggested by *Community Care Centers*, an adverse impact on commercial <u>expectations</u> that is speculated might occur as a result of competition entering the field is not sufficient enough of an impact to warrant legal protection. The overriding fallacy with the banking interests' argument is that merely because another competitor may enter the market does not equate with a discrete economic injury of the party seeking standing. It is speculative, at best, that the banking

interests who have intervened will actually lose current customers to credit unions.[1] To the extent that their purported "economic injury" looks to business not in hand, it is merely a hope that the banking interests here would capture that business. It certainly does not arise even to a level of an expectancy of successfully acquiring that business. In short, the existence of competition in the marketplace does not equate with any actual, measurable or certain economic injury.

Even if it could be established that the party seeking to be free from competition will for certain suffer an actual loss as a result of competition, such "injury" is yet another one of those well-recognized and accepted examples of *damnum absque injuria*. Resort to the court system was simply not meant to be a panacea for every perceived slight or, in this instance, disappointed expectation. More importantly, resort to the judicial system should not be allowed to recognize and further an anti-competitive strategic behavior that is reflected by the attempts of competitors to intervene in administrative proceedings.

Century Bank and MBA attempt to overcome these problems by suggesting that, since they were allowed to initiate and participate in the administrative review of the Director's decision, they are automatically entitled to appeal that decision. Brief of Appellant at 24. Such an argument ignores the language of §370.081.5 and the manner in

[1] As the statement of facts show, the bank interests in this case have been unable to show any injury or even likelihood of an injury arising from STECU's conversion to a community based credit union.

which the legislature took pains to distinguish between those who may initiate review by CUCOM and who can seek judicial review of that decision.

Section 370.081.5 is not unique in being more liberal in those it allows to initiate the administrative process and participate in it, while being more restrictive in those it allows to challenge a final action through judicial or quasi-judicial means. The Certificate of Need statute, §§197.300, *et seq*., is another example. That statute allows "affected persons" to initiate an administrative process, §197.330.1(3), RSMo., but limits standing to review the final decisions to the applicant or health systems agencies. §197.335, RSMo. The courts have consistently given deference to the legislature's authority to create such a procedural mechanism for review in the certificate of need field and have enforced it through their refusal to allow competitors to challenge final decisions of the agency through judicial or quasi-judicial review. *Missouri Health Care Association v. Missouri Health Facilities Review Committee*, 777 S.W.2d 241, 244 (Mo. App. W.D. 1989); *State ex rel. Integrated Health Services v. Missouri Health Facilities Review Committee*, 814 S.W.2d 677, 679 (Mo. App. W.D. 1991); *West County Care Center, Inc. v. Missouri Health Facilities Review Committee*, 773 S.W.2d 474, 476 (Mo. App. W.D. en banc 1989); *Community Care Centers, Inc. v. Missouri Health Facilities Review Committee*, 735 S.W.2d 13, 16 (Mo. App. W.D. 1987); *PIA Psychiatric Hospitals, Inc. v. Missouri Health Facilities Review Committee*, 724 S.W.2d 524, 525-526 (Mo. App. W.D. 1986); *St. Joseph's Hill Infirmary, Inc. v. Mandl*, 682 S.W.2d 821,

824 (Mo. App. E.D. 1984); *Health Service Management v. Health Facilities Review Committee,* 791 S.W.2d 732, 735 (Mo. App. W.D. 1990).

Nor is there anything inherently wrong with limiting judicial review to those who have a specific and legally cognizable interest in the subject matter of the administrative decision that is being directly and substantially impacted by the decision. Absent a requirement under Article V, Section 18 of the Missouri Constitution that judicial review be provided, "[w]hether the system of regulation is best served by allowing competitors to participate in the administrative procedure is a legislative determination." *St. Joseph's Hill Infirmary*, 682 S.W.2d at 826. Clearly, what the legislature has done in §370.081.5, is determine that the system of regulation of credit unions is best served by allowing those claiming to be adversely affected to raise their concerns and have them considered by CUCOM, but limit judicial review of those decisions to those who have a legally cognizable interest that has been directly and substantially impacted by the decision.

The Court of Appeals, in its decision, perceptively recognized, and eloquently stated, the rationale behind the statutory dual system of standing established by § 370.081.5, and the public good served by it:

> However, as just touched upon earlier, § 370.081.5 sets up a statutory scheme where it is quite apparent the legislature intended a dual review system of these credit union determinations by using different standing conferring language depending on what body a party wished to appeal to: CUCOM or the Circuit Court. This duality makes practical sense because CUCOM's duties are exclusively to review these type of credit union

> expansion determinations. *See* § 370.062. Therefore, it is this body that has the time and expertise to review the detailed grievances and concerns of anyone and everyone who chooses to come before them. Were we to impose this same burden on the Cole County Circuit Court, it would leave our already overburdened and overtaxed trial courts the onerous chore of having a detailed hearing for "any person or entity *claiming* to be adversely affected." § 370.081.5 (emphasis added). But our legislature had the wisdom to avoid such a result, and decided to make the circuit court available to hear only those individuals who are *in fact* aggrieved. Holding otherwise would not only be contrary to the most fundamental principles of civil procedure in Missouri in order to be heard in a court of law (that you have to actually have an interest in the lawsuit, it is not enough just to claim to have an interest), it would also go against the plain words of § 370.081.5.

Opinion of the Court of Appeals Western District at 8-9 (emphasis in original((footnote deleted).

Within the terms of §370.081.5, Century Bank and MBA are not entitled to seek judicial review of the decision of CUCOM. The trial court was correct in dismissing their claim for judicial review because they lacked standing to seek that relief.

B. APPELLANTS LACKED ANY LEGALLY COGNIZABLE RIGHT TO PROTECT OR ENFORCE SINCE THEY WERE POTENTIAL COMPETITORS OF STECU AND WERE ONLY CHALLENGING THE CREDIT UNION

COMMISSION'S ACTION TO BE FREE FROM STECU'S COMPETITION;

The second attack by Century Bank and MBA on the circuit court's decision concedes that they do not have a legally recognized interest to be free of any competition but posits that Missouri law does recognize the right to be free of illegitimate competition. Substitute Brief of Appellant at 32-38. On the basis of this right, they contend they have a right to judicial review under Article V, Section 18 of the Missouri Constitution. In stating this position, the banking interests place sole reliance on *Legal Communications Corp. v. St. Louis County Printing & Publishing Co., Inc.*, 24 S.W.3d 744 (Mo. App. E.D. 2000), and offer the theory that the right to be free of illegitimate competition arises when the underlying statute provides for a scheme of "competitive regulation." Substitute Brief of Appellant at 34.

The first problem with Century Bank's and MBA's argument is the credit union statute does not meet the pre-condition for the "freedom from illegitimate competition cause of action" that it contends defines that legally cognizable right. The statutes pertaining to a credit union expansion at issue here do not seek to regulate <u>competition</u> of credit unions, whether it be competition solely between credit unions or competition between credit unions and banks. MBA's own witness admitted that the Director and CUCOM are not in the business of regulating competition that banks might face from credit unions. [L.F. 168] Section 370.063.2 very clearly states what is being regulated with respect to expansions sought by credit unions: "determination of the credit union's capital adequacy, administrative capability and financial resources to serve the new

membership group." §370.063.2, RSMo. These are criteria that speak to regulating the solvency of credit unions and the protection of its members. Conspicuously absent from the factors to be considered is any consideration of the effect of such expansion on other competitors, whether those competitors be limited solely to other credit unions or other financial institutions, such as banks and savings and loans. This is in stark contrast to the regulatory scheme established for the banking industry. *See, e.g., Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915 (Mo. App. 1979); *Bank of Belton v. State Banking Board*, 554 S.W.2d 451 (Mo. App. W.D. 1977). MBA's witness also recognized this distinction in his testimony. [L.F. 168]

The provisions of the credit union statute which regulate the expansion and conversion of credit unions are not designed to function as "competitive regulation" of the credit union industry. Under the banking interests' theory, in the absence of such competitive regulation they cannot rely on their mere status as competitors with credit unions to maintain this action.

Legal Communications is also of no benefit to the banking interests because it does not stand for the proposition that there is a generalized right to be free from what it terms "illegitimate competition." As in the banking cases on which it relies, *Legal Communications* determined that the statutory scheme in question created an expectancy or entitlement to be free from unqualified competition in the publication of legal notices. 24 S.W.3d at 748, *citing Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915 (Mo. App. W.D. 1979) & *Bank of Belton v. State Banking Board*, 554 S.W.2d 451 (Mo. App. 1977). In essence, whatever legally cognizable right that a competitor might possess was

unique to the statutory scheme which created it. As the court noted, the right to be free from unqualified competition was inextricably intertwined with the right granted to a newspaper to compete in the first instance. 24 S.W.3d at 748. In other words, under the statutory scheme, and in order for the purpose of the statute to be carried out, the grant of authority to a newspaper to publish legal notices carried with it an accompanying grant under the statute to be free from the type of unqualified competition that existed in the case.

The banking interests point to no similar grant to be free from competition from credit unions, whether such competition be termed legitimate, illegitimate, or unqualified, in the grant of authority to them to operate as banks. Similarly, there is nothing in the credit union statute which grants any right or interest to banks to be free from the competition of credit unions, no matter how designated. Indeed, as the MBA's witness admitted, the credit union statute was not intended to regulate the competition faced by banks. [L.F. 168]

Legal Communications is distinguishable for other reasons, as well. In the case, the publisher of a legal newspaper filed a declaratory judgment action contesting the selection of a second publisher of legal newspapers by the circuit court sitting in an administrative capacity. St. Louis Legals was certified as being qualified to publish real estate foreclosure notices under Section 493.100. Legal Communications Corporation, another publisher in the area which had been granted authority to publish the same type of notices in the city, filed a petition seeking a declaratory judgment that St. Louis Legals was unqualified to publish the real estate foreclosure notices. The case was dismissed on

the grounds that the circuit court sitting in its administrative capacity had unreviewable discretion in making its certifications to publish the legal notices.

St. Louis Printing raised the issue of standing in the appellate court, arguing that Legal Communications lacked standing because certification of St. Louis Printing did not directly affect any legally protectable interest of Legal Communications. The appellate court set out the rules relating to standing in the following manner:

> The standing to contest an administrative action depends on a variety of considerations, including the nature and extent of the interest of the party contesting the action, the character of the administrative action, and the terms of the governing statute. The question of standing to oppose an administrative decision is a question of law, but one driven by the peculiar facts of each case. It rests on policy considerations rooted in the values set out in the legislation in question. A plaintiff properly has standing if the decision of the administrative body adversely affects an interest the law protects. The injury to the party must arguably fall within the "zone of interest" the statute protects.

Id. at 747.

Concerning those "peculiar" facts, the court noted that the statute at issue, Chapter 493, provided no procedure by which decisions of the court sitting as a "board" might be appealed. (Chapter 370, RSMo, to the contrary, does contain a comprehensive procedure for appeals in Section 370.081.5, RSMo.) Unlike the court in *Legal Communications*, the Court here is not free of the "explicit [legislative] guidance as to who has standing to

contest the Board's action" by statute. *Id.* at 747-748. Also unlike the court in *Legal Communications*, this Court is not required to look to any general purpose of the statute to try to determine if the alleged injury to the banking interests in this case is the type of interest the statute seeks to protect. Here, the traditional principles of the law of standing squarely apply to require Century Bank and MBA to show where they, as mere economic competitors without protected rights or interest, are expressly identified in Chapter 370, RSMo, as persons or entities with standing to appeal. Of course, they cannot do so. They have no standing granted expressly in law. The *Legal Communications* case presents no analysis, reasoning or holding which changes the result reached by the circuit court below.

Moreover, analysis under the above quoted principles from the *Legal Communications* case only further demonstrates the lack of standing of the two banking interests in this case. First, the "nature and extent of the interest of the party [Century Bank and MBA] contesting the action" before this Court is of the lowest level: It is the unadorned financial interest of an economic competitor in the market place seeking to be free of and to stifle legitimate competition in business. Such "interest" of the Banks is not worthy of protection. Nor is it, as a "policy consideration," the least bit desirable in our economic system for banks to be allowed to protect such venal, selfish interests through the processes of Chapter 370, RSMo, Credit Unions. The nature and extent of Century Bank's and MBA's interest in STECU's field of membership militates against any policy the law of standing promotes.

Finally, *Legal Communications* relies on a "zone of interest" test that lies at the heart of federal case law principles of standing. Under Missouri law, however, unless the injury is real and not hypothetical, a party has no standing before the law to contest agency decisions on judicial review, without regard for any zone of interest analysis. As will be shown in the next section, the zone of interest test is a "prudential" concern that only comes into play after it is determined that there is a particularized injury. In other words, it is the second part of a two part test that is never reached if the first part is not satisfied. The banking interests here fail even this simple test: they have no proper standing because the decision of the administrative body does not "adversely affect an interest [of theirs] the law [Chapter 370] protects." *Id.* at 747.

Further, even if the "purposes" analysis in *Legal Communications* were employed (in spite of the provision of a statutory procedure for appeals in Section 370.081.5 which precludes such "purposes" inquiry of the Court), Century Bank and the MBA would not qualify under the court's analysis in that case. The Court of Appeals in *Legal Communications* found that the purpose of Section 493.100

> "is to insure that those who have an interest in real property will receive adequate notice if that property becomes subject to a foreclosure sale. In order for a foreclosure notice to be valid, it need only be published in one newspaper certified under the statute...Unless a publication meets the subscription, cash receipts and duration requirements, it presumptively fails to provide actual and constructive notice [to the public] contemplated by the statute."

Id. at 748.

The Court found that the "purpose" served by the statute is not a purpose benefitting the publication, but is a purpose benefitting the public by assuring proper notice of foreclosures. No such external public interest is involved in the present case. The bank interests unabashedly seek to serve their own economic interests and not any public interest. They are here trying to "protect" consumers from alleged "dangers" of credit union membership, under a statute which is instead designed to promote expanded credit union membership for the benefit of the public. No purpose of the law permits, much less requires, that banks be allowed to frustrate the purpose of Chapter 370, RSMo, by using it as a tool of oppression to achieve purposes which are contrary to the very purpose of the statute.

The Court in *Legal Communications* also found that the asserted interest sought to be protected there was a valid and protectable one under the statute in that case: "The interest Legal Communications seeks to protect is its right to compete only with lawful competition." *Id.* The Court agreed, however, that no one has the right to be free from legitimate competition, citing *Community Care Centers, Inc. v. Missouri Health Facilities Review Committee, supra*. The Court found that standing existed in the *Legal Communications* case because the competition of St. Louis Printing was "illegitimate" (they were not qualified to even be in the competition with Legal Communications for certification) and because there was a demonstration of damage to *Legal Communications Corp*. in a manner sought to be prevented by the statute.

There are none of these considerations in this case and no intent to protect banks from competition by credit unions in the present statute. The competition with banks from credit unions is entirely legitimate and, most would say, desirable. Even Appellants admit that credit unions have always been in competition with banks. They do not appear to be arguing that there is anything different now than has always existed in this competition. And, importantly, it is absolutely clear that unlike Chapter 493 governing certification of legal newspapers, Chapter 370 contains no purpose to control, limit or otherwise involve the Director and Credit Union Commission in the competition between banks and credit unions. Only if such a purpose to control competition between banks and credit unions were found in the statute could the holding in *Legal Communications* have any applicability. The holding simply does not apply. A review of Chapter 370 indicates conclusively that no such "purpose of control of competition" is even suggested, much less mandated, by the legislature in the Credit Union Act. Appellants' argument that the *Legal Communications* case constitutes case law which supports Appellants' standing is wrong and should be rejected.

Additionally, "the character of the administrative action" indicates no necessity whatsoever for broad standing to contest administrative decisions on field of membership. The Director of Credit Unions and CUCOM did not order customers of any bank to join and become members of credit unions. They did not grant any entitlement to any credit union beyond the right to simply compete in the market place and do business in a geographic area. Their action creates no identifiable effect or impact on banks whatsoever, and the character of the administrative action is, thus, not such that the

societal policies of public protection so important in *Legal Communications* are the least bit implicated. Chapter 370, RSMo authorizes a level of administrative review of the consideration of credit union conversion applications by the Director and CUCOM which is appropriate to the character of these actions: Such review is appropriately limited to the capability of the applicant to serve the geographic area, which impacts few if any interests of others, and impacts no legitimate interests of banks. The banking interests here are certainly not concerned that a credit union might fail financially by serving too large an area, which is the only real concern of the Director and CUCOM under Chapter 370, RSMo. Finally, unlike the *Legal Communications* case, "the terms of the governing statute" here are clear: Only a person or entity claiming a legally protected "adverse affect" has standing to appeal, and only a person "aggrieved" by a decision of CUCOM may seek judicial review. Under the terms of the governing statutes and the character of the administrative action in question, the banking interests have no claim to standing before the Courts.

The foregoing notwithstanding, if *Legal Communications* could be read as broadly as Century Bank and MBA propose, then this Court should exercise its authority to overturn it. The banking interests' interpretation of the case would take certain statements in *Legal Communications* out of context, misconstrue other statements and would stretch the standing doctrine beyond any bounds that has ever been established by the courts of this state. If *Legal Communications* can be read to establish the principles below, it should not be allowed to stand. As the banking interests interpret the case, standing would be based on some undetermined sliding scale that ignores whether the

relief to be afforded in the case would actually redress a legally cognizable right. *See*, *e.g.*, 24 S.W.3d at 747 ("The standing to contest an administrative action depends on a variety of considerations, including the nature and extent of the interest of the party contesting the action, the character of the administrative action, and the terms of the governing statute"). The banking interests would have the judicial system turn away from focusing on the redress of legally cognizable rights to serving the interests of private attorney generals who seek no legally beneficial redress but who, by promoting their own venal interests, are also purportedly acting in the spirit of promoting the interests embodied in a particular statute for the public good. *Id.* ("A plaintiff properly has standing if the decision of the administrative body adversely affects an interest the law protects"). Instead, they would have standing analysis altogether skip any consideration of actual injury to the plaintiff and proceed immediately to the zone of interest test which, as will be shown in the next section, is intended to be a limitation on standing, not a means to expand it. *Id.* ("Standing exists if the alleged illegitimate competition of St. Louis printing damages Legal Communications in a manner sought to be prevented by the statute").

Missouri standing principles have never been as broad as the banking interests now contend. They have always required the existence of a legally cognizable right that is directly and immediately affected by the action being challenged. *City of Eureka v. Litz*, 658 S.W.2d 519, 522 (Mo. App. E.D. 1983). There is nothing to justify expanding standing doctrine to seek redress of more ephemeral interests such as enforcement of the "spirit" of a particular enactment.

C. APPELLANTS WERE NEITHER AN INTENDED BENEFICIARY OF §370.080.2(2), NOR WITHIN THE ZONE OF INTERESTS SOUGHT TO BE PROTECTED BY THAT SECTION.

The banking interests also argue that they have standing to challenge CUCOM's action because "[t]he inquiry into standing in administrative decision cases has sometimes [but not under all circumstances] involved a 'zone of interests' analysis, which has been derived primarily from the United States Supreme Court decision in *Association of Data Processing Service Org. v. Camp*, 397 U.S. 150, 153 (1970)," and that the interest sought to be protected by the two banking interests in this case are arguably within the zone of interests to be protected by the credit union statute. Substitute Brief of Appellants at 38. There are three flaws in the zone of interest argument of the banking interests: (1) the zone of interest test is not applied if the legislature has established a scheme for judicial review of administrative actions; (2) even if Missouri followed the zone of interest test adopted by the federal courts, the interests being furthered by Century Bank and MBA are not within that zone of interest; and (3) while lower Missouri courts have referenced a "zone of interest" test, any such test utilized has never been, and for good reason, as expansive as the federal zone of interest test.

Zone of interest analysis under the federal approach involves a two step process:[2] "[W]e first discern the interests 'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 118 S.Ct. 927, 935 (1998). However, if the statutory scheme states a "fairly discernible" purpose in establishing judicial review of administrative actions, then it is to control over resort to a zone of interest analysis. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 831 (1970).

As shown under subpart **a** of this point, the Missouri legislature did in fact state a fairly discernible purpose of limiting those who could seek judicial review of CUCOM's decisions, effectively preempting any zone of interest analysis in determining who has standing to challenge those decisions. Those arguments are adopted by reference here. In short, under the federal standing analysis promoted by the banking interests, either the banking interests come within the purview of §370.081.5, RSMo., or they have no standing. There is no need to determine what the zone of interests are and whether the banking interests come within them.

Besides the pre-emptive effect of §370.081.5 on the zone of interest analysis, the zone of interest test fails in this instance because the banking interests are not within those interests arguably to be protected by the statute under consideration. In this

[2] As will be seen, *infra*, this two-part zone of interest test is applied only <u>after</u> the court has been satisfied that the injury in fact component of the standing test has been met.

instance, STECU sought to convert from a common bond credit union to a community credit union. L.F. 27. The statute which controls such a conversion is very specific in setting out the interests that are to be protected in considering a conversion. That interest is the protection of the solvency of credit unions and the allowance of multiple group credit unions. §370.063.2, RSMo (criteria to be set for conversions/expansions are "determination of the credit union's capital capacity, administrative capability and financial resources to serve the new membership group"); §370.081.4, RSMo (decision to be based on whether "the credit union has the immediate ability to serve the additional group or geographic area" and whether the resulting group meets the requirements of §370.080.2); §370.081.2, RSMo. (criteria for groups in excess of 3,000 members); and §370.080.2 (a credit union may consist of one or more groups with only the individual groups required to share a particular common bond).

Thus, the zone of interest analysis in the *National Credit Union Administration* case does not apply to the Missouri credit union statutes because the interests to be protected by the two statutes are not the same. It is noteworthy in this regard that *National Credit Union Administration* held as impermissible under the federal statute that which is very clearly and expressly allowed under the Missouri statute – multiple group credit unions. In *National Credit Union Administration*, the Court determined that one of the interests arguably to be protected by the statute under consideration in that case was an interest in limiting the markets that federal credit unions could serve. Under the Missouri statute, in contrast, the concerns are with the solvency of the credit union if it expands, the ability of the credit union to administratively serve the new membership

group and the authorization of the joinder of individual groups into the multiple group credit union. These sections are not concerned with limiting the market of credit unions. Indeed, the broad language of §370.080.2 allowing for multiple groups and multiple purpose credit unions clearly indicates otherwise.

Perhaps the biggest flaw in the banking interests argument is their inability to understand that, to the extent that Missouri does apply a zone of interest test in analyzing the issue of standing, it does so on a much more limited basis than do the federal courts when they look at standing. Federal standing analysis, particularly under the federal Administrative Practices Act, 5 U.S.C. §702, is comprised of two components: (i) a sufficient injury in fact has occurred to satisfy the Article III case and controversy requirement and (ii) a prudential standing requirement, embodied in the zone of interests test, that seeks to act as a further limitation on the interference by the courts into the administrative process through collateral attacks by persons not otherwise parties to that process. *National Credit Union Administration*, 118 S.Ct. at 933.

Consideration of the federal cases on standing show that the Article III "sufficient injury in fact" is interpreted exceptionally broadly and that it goes well beyond establishing a legally cognizable interest that is sought to be protected by the action. The breadth of the concept is also illustrated by the language of 5 U.S.C. §702, the federal statute on which standing was based in *National Credit Union Administration* and *Association of Data Processing Organizations*: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702. This statute

alone sets out three classes of persons having standing: those suffering a legally cognizable wrong, those adversely affected and those aggrieved, as that term is construed under federal law.

Missouri standing principles have never been so broad in the class of persons to whom standing has been allowed. The principal reason for this is that Missouri's injury in fact prong has never been as expansive as the federal one. One thing, and only one thing, has been considered in determining whether there has been an injury in fact, i.e., whether the person seeking to maintain the suit has suffered an injury that is legally cognizable and redressable. *See, e.g., City of Eureka v. Litz*, 658 S.W.2d 519 (Mo. App. E.D. 1983). This difference in breadth of standing may be attributed to the rejection in Missouri law of the very purpose which underlies the federal standing doctrine. As recognized in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 830 (1970), the expansive federal standing doctrine (and the need for the zone of interest prudential limitation) exists to permit and further a private attorney general function. Missouri law, by contrast, has long viewed the concept of the role of the private attorney in the judicial system as against public policy. *See, e.g., Moore v. City of Pacific*, 534 S.W.2d 486, 505 (Mo. App. 1976). The standing doctrine being advanced by the banking interests in this case would contravene this well-established policy against the intermeddling of private attorney generals and would turn every licensing matter at the administrative level into a potential judicial controversy.

To the extent that Missouri courts have applied a zone of interest analysis, it has not been as a separate step in the analysis but as a means for determining if the statutes

under consideration have either expressly or impliedly defined an interest that rises to a legally cognizable interest or cause of action. *See, e.g., Legal Communications Corp. v. St. Louis County Printing & Publishing Co., Inc.*, 24 S.W.3d 744 (Mo. App. E.D. 2000); *Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915 (Mo. App. 1979); *Bank of Belton v. State Banking Board*, 554 S.W.2d 451 (Mo. App. W.D. 1977). If there is no legally cognizable interest, there is no standing; similarly, if there is such a legally cognizable interest, there is no need to proceed to a zone of interests analysis as utilized by the federal courts. In summary, Missouri does not follow the dual component federal standing test. Standing in Missouri is, as it should be, judged under a single consideration – whether there has been a sufficient injury in fact as defined under Missouri law. That injury in fact is likewise determined under a single consideration – has the party seeking to maintain the action suffered a legally cognizable wrong.

With respect to this case, Missouri law is clear. Except for the rare and unique instance in which the statutory scheme gives rise to an entitlement to be free from competition in one form or another, Missouri law has never recognized a legally enforceable right to be free from competition. *Community Care Centers, Inc. v. Missouri Health Facilities Review Committee*, 735 S.W.2d 13 (Mo. App. W.D. 1987).

II.

THE CIRCUIT COURT WAS CORRECT IN ITS DISMISSAL OF APPELLANTS' REQUEST FOR NON-CONTESTED CASE JUDICIAL REVIEW OF THE CREDIT UNION COMMISSION'S

GRANT OF AN EXEMPTION FROM THE 3,000 MEMBERSHIP GROUP PROVISION OF §370.081.2, RSMO., (COUNTS II & III) BECAUSE THE APPELLANTS LACKED STANDING TO MAINTAIN SUCH AN ACTION IN THAT (A) THEY LACK ANY COGNIZABLE LEGAL INTEREST TO BE FREE FROM ECONOMIC COMPETITION FROM CREDIT UNIONS, INCLUDING ANY PERCEIVED RIGHT TO BE FREE FROM "ILLEGITIMATE COMPETITION" AND (B) APPELLANTS ARE NEITHER INTENDED BENEFICIARIES OF FIELD OF MEMBERSHIP PROVISIONS IN THE CREDIT UNION STATUTE NOR ARE THEY WITHIN THE ZONE OF INTERESTS PROTECTED BY §370.081.2, RSMO.

Standard of review. The review of a litigant's standing to pursue a claim is *de novo* and no deference is given to the trial court's decision. *Home Builders Association of Greater St. Louis v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. App. E.D. 2000). Both the petition and any other non-contested facts (in this case, the uncontested facts adduced at the administrative hearing) are accepted as true. *Id.* Standing is then determined as a matter of law on the basis of those facts. *Id.*

Argument. Counts II and III of the banking interests' petition sought judicial review of and mandamus related to what Century Bank and MBA refer to as a non-contested case decision by CUCOM to exempt STECU from the 3,000 membership group limit of §370.081.1, RSMo. The banking interests based those claims on the

review procedures found in §536.150. They admit in their brief, however, that for purposes of standing, they must first overcome the requirement that there is a legal duty, right or privilege which the law recognizes that they are trying to enforce in their action. Substitute Brief of Appellants at 50. The cognizable legal interest that they propose gives them standing is the right to be free from illegitimate competition. *Id.*

For all of the reasons set forth under Point I, the circuit court was correct in dismissing Counts II and III because Century Bank and MBA lacked standing. To the extent that the banking interests argue about a legally cognizable right to be free from illegitimate competition, of being an intended beneficiary of the credit union regulatory scheme and being within the zone of interests of the credit union statutes, STECU's arguments from Point I are incorporated by reference.

The standing requirement to invoke jurisdiction of the courts to review a "non-contested" agency decision is no different than the standing requirement for such review in Section 536.100, RSMo. This rule of law is set out in one of the cases on which the banking interests' principally rely in their arguments under Point I of their brief. *Farmer's Bank of Antonia v. Kostman*, 577 S.W.2d 915, 921 (Mo. App. W.D. 1979). The banking interests' argument that the standing requirements are different based upon different phrasing in the statute of the same principles is meritless. The difference in wording (absence in Section 536.150.1 of the word "aggrieved") does not vitiate the rules of standing; rather, such differences relate to the differences between administrative agency decisions made with and without agency hearing.

The circuit court below rejected the banking interests' argument that standing is different for judicial review as a non-contested case under Section 536.150, RSMo, than it is under Section 536.100. (L.F. 132-133). It stated that it was:

> unconvinced that section 536.150 is intended to change long held principles of standing by its language. The purpose of this provision is to assure compliance with article V, section 18, Mo. Const., and its guarantee of judicial review of all administrative decisions which "affect private rights." Section 536.150 does not create any rights, but only protects rights that are affected. It is the very absence of such a legally and constitutionally recognized private right to be free of competition that precludes plaintiff's standing for judicial review. There is no more of a legally recognized private right of plaintiffs to enable review under section 536.150 than under section 536.100. See *Querry v. State Highway and Transportation Commission*, 60 S.W.3d 630, 636-637 (Mo. App. W.D. 2001).

L.F. 132.

The *Querry* case cited by the court is instructive. Querry sought review under §536.150 of a Missouri Highway and Transportation Commission (MHTC) contract for the installation of fiber optic cable which was let after competitive bidding. The terms of the bid documents and the contract provided for application of the Missouri Prevailing Wage Law. Plaintiffs, labor union officers and members of IBEW, filed a "Petition for Declaratory Judgment" pursuant to Section 536.150, RSMo, in the Circuit Court of Cole County against MHTC and its contractor, seeking a declaration that the agreement was

subject to the Missouri Prevailing Wage Law, and that all future similar agreements would also be subject to the Missouri Prevailing Wage Law. Like the banking interests in this case, Querry was a stranger to the entire transaction with a collateral economic interest in the subject matter. After first rejecting Querry's claim of "taxpayer standing," the court next considered "whether appellants had standing to bring their action, as they claimed in their petition [as a non-contested case], pursuant to section 536.150." *Querry* at 635. After quoting Section 536.150.1 verbatim, the court observed:

> For a party to have standing for review under section 536.150, the agency action must directly affect the private rights of the person seeking judicial review. *Mo. Nat. Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 275 (Mo. App. W.D. 2000).

Id. at 636 (emphasis added). The court found that Appellants were strangers to the contract which was the subject of their request for declaratory judgment; and found (as is the case here) that "the petition made no allegation as to a legally protectable interest of appellants' that was adversely affected or how those rights were affected." *Id.* As in the present case, Querry argued abstractions of unfairness about the process and inadequacies of performance by MHTC, none of which were found by the court to confer standing because "a plaintiff has no right to be free from economic competition." (Citing *Mo. Health Care Ass'n, supra* 777 S.W.2d at 244). *Id.* at 636-637. Finally, the court in *Querry* correctly identified the real problem faced by Century Bank and MBA in this case: After noting the inconsistency of Querry claiming both standing as a taxpayer (protecting "public rights") and standing under Section 536.150 (pursuing "purely

personal grievances"), the court flatly denied standing to those appellants for court review:

> Unfortunately for appellants, everyone who desires judicial review does not necessarily possess a sufficient legally cognizable interest to satisfy the threshold requirement of standing.

Querry v. State Highway and Transportation Commission, 60 S.W.3d 630, 637 (Mo. App. W.D. 2001).

The circuit court below specifically relied upon *Querry, supra*, in its analysis of Appellants' claim of standing for review under Section 536.150. (L.F. 132-134). It is noteworthy that the banking interests make no mention of *Querry* in their brief, but instead attempt to divert attention away from their shortcoming in standing by a discussion on the merits of its claim, Substitute Brief of Appellant at 50, which are relevant only if the court determines they have standing and accepts jurisdiction of the case for review. Such arguments on the merits are not before this court on the issue of standing, and, in any event, the banking interests' attempt to segment proceedings before CUCOM into "contested" and "non-contested" portions is unavailing. CUCOM's decision is, as found by the circuit court, reviewable in all of its aspects, both contested and non-contested, on each order and ruling, only upon initiation of judicial review by a party with standing. Because Century Bank and MBA lack any claim of standing, judicial review is unavailable to Appellants whether on a contested case or non-contested case basis. Contrary to the banking interests' assertion, the court below was not "confused" by their attempt to obtain review of one decision of CUCOM under Section

536.150, and the remainder under Section 536.100. The trial court correctly found that these parties have no standing for review under either provision.

In summary, the Circuit Court of Cole County was correct in dismissing Counts II and III for lack of standing to maintain review as a non-contested case. The same lack of any legally recognized right or interest capable of being protected by CUCOM or the court under Chapter 370, RSMo, or any other statute, or under the Missouri Constitution, renders the banking interests without standing to seek relief by judicial review. Because the Credit Union Commission's regulatory framework is not designed or intended to protect banks from competition from credit unions, and because there is no protected right to be free from economic competition in the financial services industry (whether it be legitimate or illegitimate competition), the banking interests should take their complaints of unfairness to the legislative branch of government, where such complaints properly belong, rather than to the courts.

III.

THE CIRCUIT COURT DID NOT ERR IN DISMISSING COUNT IV OF THE PETITION CHALLENGING THE VALIDITY OF 4 CSR 105-3.010(1) BECAUSE CENTURY BANK AND MBA LACKED STANDING TO CHALLENGE THE RULE UNDER §§536.050 & 536.053, RSMO., IN THAT THE SAME REQUIREMENTS OF STANDING TO MAINTAIN AN ACTION IN CIRCUIT COURT PERTAIN TO ALL OF APPELLANTS' PETITION REGARDLESS OF THE FORM OF ACTION AND APPELLANTS ARE NOT, AS A

MATTER OF LAW OR FACT, AGGRIEVED FOR THE PURPOSE OF MAINTAINING A DECLARATORY JUDGMENT PURSUANT TO CHAPTER 536, RSMo.

Standard of review. The review of a litigant's standing to pursue a claim is *de novo* and no deference is given to the trial court's decision. *Home Builders Association of Greater St. Louis v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. App. E.D. 2000). Both the petition and any other non-contested facts (in this case, the uncontested facts adduced at the administrative hearing) are accepted as true. *Id.* Standing is then determined as a matter of law on the basis of those facts. *Id.*

Argument. The banking interests' argument under Point III of their appeal simply duplicates, in substance, their argument under Point II regarding non-contested case. The banking interests argue (once again) that the requirement for standing to bring a declaratory judgment action is "different" than that standard articulated in previous decisions of this and other courts. For all of the reasons stated in Point I and Point II of this brief, Century Banks' and MBA's argument should be rejected. Those reasons are incorporated by reference.

> In a declaratory judgment action, the standard to be applied in determining whether a party has standing to bring a suit is whether the plaintiff has a legally protectible interest at stake. *City of Hannibal v. Marion County*, 745 S.W.2d 842, 844 (Mo. App. 1988). Standing does not relate to the legal capacity to sue, but to the interest of an adversary in the subject of the suit as an antecedent to the right to relief. *Id.*

Group Health Plan, Inc. v. State Board of Registration for the Healing Arts, 787 S.W.2d 745, 749 (Mo. App. E.D. 1990). There is no separate or "special" standing rule reserved for declaratory judgment actions concerning rules and regulations under Section 536.050, RSMo.

The banking interests also submit that their declaratory judgment action should be allowed under the provisions of Sections 536.050 and 536.053, RSMo, which they contend established new standing standards for purposes of such declaratory judgment actions. Again, their argument for statutory standing must fail.

It is beyond dispute that principles of standing apply equally to declaratory judgment actions, whether generally or when directed against administrative rules. *Group Health Plan*, *supra* at 749; *Querry v. State Highway and Transportation Commission*, 60 S.W.3d 630, 634 (Mo. App. W.D. 2001). ("Standing is a threshold requirement. Without it, a court has no power to grant the relief requested," citing *In Re Estate of Scott*, 913 S.W.2d 104, 105 (Mo. App. E.D. 1995)); Accord, *Legal Communications Corporation v. St. Louis County Printing and Publishing Company, Inc.*, 24 S.W.3d 744 (Mo. App. E.D. 2000). As already established, Century Bank and MBA have no legally recognized or protected interest or right at stake in decisions of CUCOM concerning field of membership for credit unions. There is no right to be free of economic competition, and Chapter 370 bestows no specific right of standing on banks to contest Commission decisions.

However, the banking interests argue that the declaratory judgment authorization of §536.050, RSMo, which adopts standard declaratory judgment principles and rules for

application to administrative agency regulations, and which has always required the same standing as any other declaratory judgment action, has now undergone legislative revision to "lower" the standing requirement. Such contention is without any merit.

Section 536.050, RSMo, states in pertinent part:

> The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof...nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section.

Section 536.053, RSMo, states in pertinent part:

> Any person who is or may be aggrieved by any rule promulgated by a state agency shall have standing to challenge any rule promulgated by a state agency and may bring such an action pursuant to the provisions of section 536.050.... (Emphasis added.)

The banking interests vaguely contend that the language in §536.053 regarding "any person who is or may be aggrieved" by any rule expands the scope of standing to bring declaratory judgments pursuant to §536.050. This is not the case. The language in Section 536.053 is simply consistent with and complimentary to §536.050, in grammatically matching twin concepts of challenges to "the validity of rules," and challenges based on "threatened application thereof," in §536.050, to the same consistent standing requirement that any such person "must be aggrieved" by an invalid rule or "may be aggrieved" by the threat of application of such an invalid rule to them.

The regulation complained of by Century Bank and MBA does not apply to them. The regulation applies only to credit unions. The Director and CUCOM have not applied such rule to these Appellants, nor have they threatened to apply this rule to either Century Bank or MBA. The bank and the association are strangers to any action or transaction of the Director, CUCOM and STECU regarding the application of Rule 4 CSR 105-3.010(1). The banking interests have no standing to seek declaratory judgment on the validity of that rule under Sections 536.050 and 536.053, RSMo.

Century Bank and MBA, having made the bald assertion of standing under these statutes, once again attempt to divert attention from their lack of standing to a skewed and insupportable argument of the merits of their claim. The banking interests have not demonstrated, and cannot demonstrate, sufficient standing to bring a declaratory judgment pursuant to Sections 536.050 and 536.053, RSMo. The trial court properly and correctly so found and dismissed Count IV of the petition. The decision of the Circuit Court should be affirmed.

IV.

THE CIRCUIT COURT WAS CORRECT IN DISMISSING THE CLAIMS OF THE MISSOURI BANKERS ASSOCIATION FOR LACK OF ASSOCIATIONAL STANDING TO MAINTAIN A PETITION FOR REVIEW OF AGENCY ACTION BECAUSE MBA FAILS THE ESTABLISHED TEST FOR STANDING AS AN ASSOCIATION REPRESENTING THE INTERESTS OF ITS

MEMBERS, IN THAT NO MEMBER OF MBA HAS BEEN SHOWN TO HAVE STANDING TO BRING THIS ACTION IN SUCH MEMBER'S OWN RIGHT; MBA AND ITS MEMBERS LACK ANY LEGALLY RECOGNIZED INTEREST PROTECTED BY LAW WHICH IS CAPABLE OF BEING PROTECTED UNDER CHAPTER 370, RSMo; AND BECAUSE PARTICIPATION OF THE INDIVIDUAL MEMBERS CLAIMING ECONOMIC INJURY IS REQUIRED TO ESTABLISH THE ASSERTED INTEREST OF MBA MEMBERS IN BEING FREE FROM INJURY CAUSED BY ECONOMIC COMPETITION FROM CREDIT UNIONS.

Standard of review. The review of a litigant's standing to pursue a claim is *de novo* and no deference is given to the trial court's decision. *Home Builders Association of Greater St. Louis v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. App. E.D. 2000). Both the petition and any other non-contested facts (in this case, the uncontested facts adduced at the administrative hearing) are accepted as true. *Id.* Standing is then determined as a matter of law on the basis of those facts. *Id.*

Argument. The Missouri Bankers Association has no standing in this case at all. Missouri does recognize the right of not-for-profit associations to intervene in legal proceedings for the purpose of protecting the rights of its members under certain circumstances. See *Missouri Outdoor Advertising Association, Inc. v. Missouri State Highways and Transportation Commission*, 826 S.W.2d 342 (Mo. banc 1992). However,

the MBA meets none of the requirements for representation of its member's interests in this legal proceeding.

In *Missouri Outdoor*, this Court adopted the test set forth by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), for determining an organization's right to sue or intervene on behalf of its members.

> The court stated an association could be permitted to sue on behalf of its members if:
>
> . . . (a) its members would otherwise have standing to bring suit in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Missouri Outdoor Advertising, supra at 344. (Citing *Hunt*, supra at 343.) *See, also, Missouri National Education Ass'n v. Missouri State Board of* Education, 34 S.W.2d 266, 275 (Mo. App. W.D. 2000); *Home Builders Association of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612, 614 (Mo. App. E.D. 2000).

There is no standing available to MBA because, as extensively hereinbefore noted, its member banks individually have no standing to seek judicial review under Section 370.081.5, RSMo, in their own right. Further, the interests MBA seeks to protect, even if germane to the organization's purpose of "protecting banks," are contrary to the Credit Union Act statute, relevant case law and public policy, because they are solely interests in stifling competition. Standing cannot be granted to protect unrecognized and unlawful

purposes. Finally, and most importantly, both the claim here asserted and the relief requested in this appeal obviously requires participation of the individual members, as this is the only way to determine the existence or possibility of any alleged "adverse affect" or harm forming the basis of the claim of interest. Such "affect," if it exists at all, must be determined upon analysis of each individual member bank's claim of economic harm, for to do less trivializes to insignificance the requirement of real harm to a litigant's protected interests. If competitive harm is indeed the basis for the claim of standing, as the banking interests insist it is, clearly it is the individual bank and not the association that must show such actual, real harm, injury and impact. MBA, therefore, fails the third prong of the *Missouri Outdoor Advertising* test also.

Neither MBA nor Century Bank have standing to invoke the jurisdiction of the courts in this case; and, in any event, MBA lacks "associational standing" to bring this action as a party on behalf of its members. MBA fails to qualify under the test of "associational standing" as a representative of its membership because its members do not have standing to bring an appeal of this matter in their own right.

Based on the record, it is therefore clear that, in addition to lack of standing for either Century Bank or MBA to seek judicial review in this case, the Missouri Bankers Association has no role whatsoever as a party in this proceeding and was properly dismissed as a party for lack of standing by the circuit court. That decision should be affirmed.

CONCLUSION

Because neither Missouri Bankers Association nor Century Bank of the Ozarks have standing to appeal and seek judicial review of a decision of the Credit Union Commission under Section 370.081.5, RSMo 2000, Respondent Springfield Telephone Employees Credit Union, n/k/a TelComm Credit Union, respectfully requests this Court to affirm the decision of the Circuit Court of Cole County and dismiss Appellants' Petition for lack of standing.

Respectfully submitted,

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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 13,449 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" 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 two copies of the foregoing Respondent STECU's Brief were sent U.S. Mail, postage prepaid, to the following parties of record on this _____ day of July, 2003:

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