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IN THE SUPREME COURT OF THE STATE OF FLORIDA

EMIL J. WEIMAN, *et ux.*,

Petitioners,

v.

THOMAS N. McHAFFIE, *et ux.*,

Respondents.

Case No. 65,344
First District Court
of Appeal
Case No. AT-476

BRIEF OF AMICUS CURIAE
FEDERAL HOME LOAN MORTGAGE CORPORATION

Hume F. Coleman
HOLLAND & KNIGHT
Post Office Drawer 810
Barnett Bank Building
Tallahassee, Florida 32302

Maud Mater
Senior Vice President and
General Counsel
Garrett C. Burke
Associate General Counsel
Federal Home Loan Mortgage Corp.
1776 G Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae

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Attorneys for Amicus Curiae

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BRIEF OF AMICUS CURIAE
FEDERAL HOME LOAN MORTGAGE CORPORATION

I. STATEMENT OF INTEREST OF AMICUS CURIAE

This amicus curiae brief is filed by the Federal Home Loan Mortgage Corporation ("FHLMC") pursuant to leave of Court and in support of petitioners. FHLMC believes that due-on-sale clauses are enforceable without a showing that the mortgagee's security will be impaired by the transfer of the real property security and, accordingly, that the certified question should be answered in the affirmative.

FHLMC's brief provides this Court with information about the role of the secondary mortgage market in home financing -- both nationwide and in Florida -- and about the potential effect of this case on Florida's continued access to the nationwide secondary mortgage market. As will be described in greater detail below, FHLMC is interested in this case both as a United States government instrumentality charged with fostering an efficient secondary mortgage market and as the purchaser of a substantial number of Florida mortgages which could be directly affected by the answer to the certified question.

A. Reasons for Establishing FHLMC

FHLMC was established by the Emergency Home Finance Act of 1970, Public Law 91-351, 12 U.S.C. § 1451 et seq., to create

a secondary[1/] mortgage market for the purchase and sale of conventional[2/] mortgages on residential property. Its Board of Directors is composed of the three members of the Federal Home Loan Bank Board (the "Bank Board"), who are appointed by the President with the advice and consent of the Senate. The Chairman of the Bank Board is Chairman of FHLMC's Board of Directors. The capital stock of FHLMC consists solely of non-voting common stock held by the twelve Federal Home Loan Banks. See 12 U.S.C. §§ 1452(a), 1453(a). FHLMC, in sum, is an integral part of the Federal Home Loan Bank System.

Congress viewed establishment of FHLMC in 1970 as crucial to its legislative program designed to ameliorate the then current national housing crisis. As Senator Sparkman put it: "It is obvious to the committee that economic conditions in this Nation are approaching a critical level, and that immediate action is necessary if we are to avoid a further drop in the economy and possibly a serious recession by the end of the year." 116 Cong. Rec. 12205 (April 16, 1970). The Committee Reports graphically demonstrate a belief that the economic crisis in the offing was caused in great part by the high cost of mortgage

1/ The primary mortgage market is composed of transactions between mortgage originators (lenders) and home owners or builders. The secondary mortgage market consists of sales and resales of mortgages between mortgage originators and purchasers from originators.

2/ A conventional mortgage is a mortgage which is not guaranteed or insured by a Federal or State agency. See 12 U.S.C. § 1451(i). Before FHLMC's creation, the secondary market for mortgages was for the most part restricted to government-insured or guaranteed mortgages.

credit and the resultant impact on both the construction industry and the prospective home buyer. S. Rep. No. 91-761, 91st Cong., 2d Sess. 2-4 (1970); H.R. Rep. No. 91-1131, 91st Cong., 2d Sess. 4-5 (1970). The conventional secondary mortgage market operations of FHLMC were designed to help deal with that crisis by broadening the secondary market for conventional mortgages and by attracting additional capital into the mortgage market as a result of increasing the liquidity of conventional mortgages. S. Rep. No. 91-761, 91st Cong., 2d Sess. 7, 9 (1970); 116 Cong. Rec. 24967 (July 20, 1970) (remarks of Congressman Patman); Hearings on S. 2958, S. 3503, S. 3508 and S. 3442 Before the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 57-59 (1970) (remarks of Chairman Martin of the Federal Home Loan Bank Board). [Hereinafter cited as "Senate Hearings."] The housing and mortgage credit crisis of 1970 generated a legislative recognition that a secondary market in conventional mortgages was necessary as an ongoing part of an adequate national housing program. 116 Cong. Rec. 21567 (June 25, 1970) (remarks of Congressman Widnall).

B. FHLMC's Role in Mortgage Financing in Florida

FHLMC operates as a financial intermediary between mortgage originators and the general capital markets. It purchases mortgages (or interests in mortgages) from primary lenders, pools them, and sells them to institutional investors in the form of mortgage pass-through securities. Funds from these pass-through sales are in turn used for the further purchase of mortgages. From its chartering in 1970, through December 31,

1983, FHLMC has purchased an aggregate principal balance of $74.9 billion in conventional mortgages. As of December 31, 1983, it serviced a portfolio of $64.2 billion in conventional mortgages.[3]

Without the ability to sell conventional mortgages in the secondary market, primary lenders (for the most part thrift institutions, such as savings and loan associations and savings banks, and commercial banks) would be limited in their mortgage originations by the amount of savings deposits they attract, loan repayments they receive, and borrowings. In localities where local demand exceeds the local supply of funds, the secondary mortgage market provides the needed influx of additional mortgage dollars.

Florida has been a significant beneficiary of the conventional secondary mortgage market. For example, from January, 1981 through May, 1984, FHLMC committed to purchase $4.5 billion in Florida mortgages. FHLMC currently services a portfolio of approximately 107,000 Florida mortgages with an aggregate unpaid principal balance of approximately $3.4 billion.[4] Unquestionably, ready access to an active secondary mortgage market has

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3/ The difference between the amount purchased and the amount serviced is accounted for by principal amortization payments and principal prepayments made with respect to the mortgages purchased.

4/ A substantial number of FHLMC's mortgage purchase commitments are for optional delivery with the mortgage seller having the option not to deliver. When the mortgage seller exercises the option not to deliver, FHLMC's commitment does not result in the purchase of mortgages. FHLMC's servicing portfolio therefore is less than its volume of purchase commitments.

been an essential element in the continued viability of the home finance and construction industries in Florida. For the reasons explained in detail in the Argument portion of this brief, a mortgage lender's ability to enforce a due-on-sale clause in accordance with its terms and without regard to whether the property transfer impairs the lender's security is an important element promoting lender access to the secondary mortgage market.

C. FHLMC/FNMA Uniform Mortgage Instruments

The 1970 legislation which chartered FHLMC also expanded the powers of the Federal National Mortgage Association ("FNMA") to enable FNMA to create a secondary market in conventional mortgages. See 12 U.S.C. § 1717(b)(2). The legislative history of FHLMC's enabling legislation and of FNMA's expanded conventional mortgage purchase authority clearly reflects a Congressional intent that the federally sponsored conventional secondary mortgage market should have as one of its goals the creation of standardized mortgage instruments. Both the House and Senate Committee Reports thus emphasize an expectation that FHLMC and FNMA would collaborate to produce such standardized conventional mortgage instruments. See S. Rep. No. 91-761, 91st Cong., 2d Sess. 7, 25 (1970); H.R. Rep. No. 91-1131, 91st Cong., 2d Sess. 7 (1970); see also Senate Hearings at 6, 37, 71-72.

Responding to this Congressional directive, FHLMC and FNMA designed uniform mortgage instruments for the purpose of standardizing the mortgage documentation used by lenders on a national basis. Public hearings were conducted to discuss the proposed standardized instruments. See S. Doc. No. 92-21, 92d

Cong., 1st Sess. (1971). Senator Sparkman, who was responsible for FHLMC's enabling legislation, described the development of the FHLMC/FNMA standard mortgage documents as "one of the greatest breakthroughs in home finance since the start of the FHA" and expressed the expectation that the FHLMC/FNMA mortgage documents would be "universally adopted for all conventional mortgage transactions throughout the 50 States." Id. at III. The mortgage instruments considered at the hearings and those later adopted for use by FHLMC and FNMA contained a due-on-sale clause substantially identical to that in the mortgage before this Court.[5/] See Id. at 5, 7, 10, 11, 16, 18.

Senator Sparkman's hope that the FHLMC/FNMA standardized instruments would be "universally adopted" has been realized. FHLMC estimates that approximately 80% of all conventional mortgages currently being originated are originated on the FHLMC/FNMA instruments. In short, this Court is faced with issues affecting far more than a single mortgage. A proper resolution of these issues requires an understanding that the mortgage in question contains a due-on-sale clause which is used nationwide to originate billions of dollars of conventional mortgages.

[5/] The due-on-sale clause in the FHLMC/FNMA standardized mortgage instruments is contained in Uniform Covenant 17. In relevant part, Uniform Covenant 17 provides: "If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, . . . Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable."

II. ARGUMENT

FHLMC addresses below three major points, each of which is within the scope of the question certified by the First District Court of Appeal. First, FHLMC believes that Florida is not a "window period" state for purposes of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1701j-3 (the "Garn-St. Germain Act"). Second, FHLMC presents argument as to the broader question whether due-on-sale clauses in Florida mortgages can be enforced by the mortgagee without a showing that the transfer of the real property will impair the mortgagee's security. FHLMC's argument as to this question focuses upon the importance of enforcement of due-on-sale clauses to institutional mortgage lenders and to the secondary mortgage market. Finally, if this Court determines that Florida is a window period state and that the mortgagee must demonstrate an impairment of security to enforce a due-on-sale clause, FHLMC urges this Court to confine its decision to mortgages where the mortgagee is not an institutional lender. Extending the decision below to all Florida mortgage originators will create a competitive inequality between state chartered savings and loan associations and commercial banks, which would be precluded from enforcing due-on-sale clauses except where an impairment of security could be demonstrated, and their federally chartered counterparts (federal savings and loan associations and national banks), which are entitled to enforce due-on-sale clauses without limitation.

A. Florida Is Not a Window Period State

As relevant here, the Garn-St. Germain Act provides that a state is a "window period" state only where, prior to October 15, 1982, "the highest court of such State has rendered a decision (or if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision . . . if such decision applies State-wide) prohibiting . . . exercise" of due-on-sale clauses. 12 U.S.C. § 1701j-3(c)(1). Since this Court has not addressed the subject of enforcement of due-on-sale clauses, the question becomes whether a decision by a single District Court of Appeal, such as First Federal Savings and Loan Association v. Lockwood, 385 So. 2d 156 (Fla. 2nd DCA 1980), constitutes a decision which "applies State-wide" for purposes of the Garn-St. Germain Act.

It is hornbook law that words in a federal statute -- in this case, whether a decision of a state intermediate appellate court is a decision which "applies State-wide" -- are to be interpreted to effectuate the intent of the United States Congress. See, e.g., Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962). Congress was clear that, although intermediate appellate courts in several states, one of which was Florida, had restricted the exercise of due-on-sale clauses, these states were not window period states. See S. Rep. No. 97-536, 97th Cong., 2d

Sess. 22-23, reprinted in 1982 U.S. Code Cong. & Admin. News 3076-3077.[6/]

Congress also was clear that a decision of a state intermediate appellate court would be considered to apply "State-wide" only where that decision was rendered by a court with "statewide jurisdiction." Id. at 22 n.3, reprinted in 1982 U.S. Code Cong. & Admin. News at 3076 n.3. As this Court well knows, each District Court of Appeal presides over geographically limited contiguous counties and hears only such appeals as shall arise within its "appellate district." Florida Constitution, Art. 5, § 4. A single District Court of Appeal simply is not a court with statewide jurisdiction and therefore its decision does not apply "State-wide" for purposes of the Garn-St. Germain Act.[7/]

[6/] The Senate Banking, Housing and Urban Affairs Committee stated without qualification that "those states having [intermediate appellate court] judicial decisions which do not apply statewide, such as New York and Florida, will not be window period states." S. Rep. No. 97-536, 97th Cong., 2d Sess. 23, reprinted in 1982 U.S. Code Cong. & Admin. News 3077. The version of the Garn-St. Germain Act passed by the House of Representatives, H.R. 6267, contained no provisions with respect to due-on-sale clauses. See 128 Cong. Rec. H2451-H2474 (Daily ed. May 20, 1982); H.R. Rep. No. 97-550, 97th Cong., 2d Sess. (1982). Accordingly, the Senate Committee Report is the only expression of the intent of Congress as to the proper interpretation of the due-on-sale clause provisions in the Garn-St. Germain Act. See S. Conf. Rep. No. 97-641, 97th Cong., 2d Sess. 89, reprinted in 1982 U.S. Code Cong. & Admin. News 3132.

[7/] The opinion below of the First District Court of Appeal held that a state intermediate appellate court decision is considered to apply State-wide for purposes of the Garn-St. Germain Act if there were no conflicting decisions from other intermediate appellate courts or the state's Supreme Court. The opinion below thus ignores Congress' clear statement that an intermediate appellate court decision creating a window period state was limited to state intermediate appellate courts with statewide jurisdiction.

The geographically limited jurisdiction of each Florida Court of Appeal can be contrasted to the statewide jurisdiction of the Michigan Court of Appeals, a state intermediate appellate court acknowledged by Congress as creating a window period in Michigan. See S. Rep. No. 97-536, 97th Cong., 2d Sess. 22-23, reprinted in 1982 U.S. Code Cong. & Admin. News 3076-3077. Michigan has a single Court of Appeals, Michigan Constitution, Art. 6, § 1, with a single Chief Judge. Michigan General Court Rules of 1963, Rule 800.7.[8/] Accordingly, a decision of any division of the Michigan Court of Appeals applies statewide until overruled by another division or reversed by the Michigan Supreme Court.[9/] Tebo v. Havlik, 418 Mich. 350, 343 N.W.2d 181, 185

8/ The Michigan Supreme Court is empowered to create divisions of the Michigan Court of Appeals. Michigan Constitution, Art. 6, § 8; Michigan General Court Rules of 1963, Rule 800.1, 800.2. Each division of the Court of Appeals consists of a panel of three judges who are rotated in accordance with the rules of the Michigan Supreme Court. Mich. Comp. Laws Ann., § 600.311 (1981). These rules provide that the "judges of each Division shall be rotated in such manner as to cause each judge to sit with each other judge with equal frequency." Michigan General Court Rules of 1963, Rule 800.1. A decision by a division of the Court of Appeals is deemed to be a decision of the entire Court of Appeals. Michigan General Court Rules of 1963, Rule 800.4.

9/ If one division of the Michigan Court of Appeals can overrule an earlier decision of another division, it is obvious that the Court of Appeals is a single court with statewide jurisdiction. In October, 1983, the Michigan Court of Appeals adopted a procedure whereby conflicting decisions between Court of Appeals panels were to be resolved by a vote of the entire Court of Appeals. See Lowry v. Sinai Hospital of Detroit, 129 Mich. App. 726, 343 N.W.2d 1, 3 n.4 (Mich. Ct. Apps. 1983). An en banc procedure of this type could be adopted only by a single court with statewide jurisdiction. Since they are not courts of statewide jurisdiction, the various Florida District Courts of Appeal do not have authority to resolve conflicts by a single, en banc decision.

(footnote continued)

(Mich. Sup. Ct. 1984); Hackett v. Kress, 1 Mich. App. 6, 133 N.W.2d 221 (Mich. Ct. Apps. 1965).[10/]

Congress has created a clear distinction between a single state intermediate appellate court with statewide jurisdiction, such as the Michigan Court of Appeals, and a group of state intermediate appellate courts with geographically limited jurisdiction, such as the various Florida District Courts of Appeal. Only a decision by the former type of intermediate appellate court can create a Garn-St. Germain Act window period. Accordingly, Florida is not a window period state.[11/]

(footnote continued from previous page)

The system of court organization in Michigan thus contrasts with the system in Florida where conflicts among decisions of the various District Courts of Appeal can be resolved only by the Florida Supreme Court. See Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 223-224 (Fla. Sup. Ct. 1965); Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. Sup. Ct. 1962). Indeed, as this Court well knows, conflicting decisions of the District Courts of Appeal occur with some frequency and result in a lack of uniformity in Florida law unless and until this Court resolves the conflict. In Michigan, however, two conflicting decisions of the Court of Appeals cannot co-exist. Prior to October, 1983, the most recent decision controlled. Today, the Michigan Court of Appeals resolves conflicts itself by use of an en banc procedure.

[10/] The opinion of the First District Court of Appeal also finds support for its conclusion that Florida is a window period state in Scappaticci v. Southwest Savings and Loan Association, 135 Ariz. 456, 662 P.2d 131 (1983). See Typewritten Opinion, at p. 5 n.3. However, as the Scappaticci opinion itself recognizes, the intermediate appellate court in Arizona -- the Arizona Court of Appeals -- is a single court with two divisions and thus is organized on the same basis as the Michigan Court of Appeals. Scappaticci does not support the opinion below.

[11/] The Senate Committee Report contains a statement that "just what the state law is in any particular state would be determined by the highest court of that state." S. Rep. No. 97-536, 97th Cong., 2d Sess. 22 n.3, reprinted in 1982 U.S. Code Cong. & Admin. News 3076 n.3. This statement is not intended to -- and does not -- suggest that there is no federal law standard for determining whether a decision by a particular state intermediate

(footnote continued)

B. Due-on-Sale Clauses Should Be Enforceable Without Regard to Impairment of Mortgagee's Security

This Court has not yet spoken whether a due-on-sale clause can be enforced in accordance with its terms and without a demonstration by the mortgagee that the property transfer will result in an impairment of the mortgagee's security. This Court's prior cases, such as St. Martin v. McGee, 82 So. 2d 736 (Fla. 1955), apparently requiring some showing of impairment have dealt with mortgage covenants designed exclusively to protect the mortgagee's security. A due-on-sale clause, however, serves three distinct purposes, only one of which is protection of the mortgagee's security. Accordingly, this Court can -- and should -- answer the certified question by holding that a due-on-sale clause can be enforced by the mortgagee without a showing of impairment of security.

A due-on-sale clause is not an instrument of avarice or caprice, but of sound mortgage lending policy. The clause furthers three goals essential to successful mortgage lending operations: (1) it permits lenders to evaluate ("underwrite") the credit of each successive purchaser of the underlying security property; (2) it permits lenders to increase mortgage portfolio yields during a rising interest rate market, thereby decreasing the interest rates charged the general public at the time of mortgage origination; and (3) it enhances the operation of the

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(footnote continued from previous page)
appellate court can create a window period. Rather, the statement refers to whether and when a particular state had adopted specific substantive restrictions on the enforcement of due-on-sale clauses.

conventional mortgage secondary market by shortening the average life of mortgages, thereby increasing effective yields to secondary market investors and attracting more funds to the residential mortgage market.

1. Credit Underwriting

The first function of a due-on-sale clause is credit underwriting. Just as a mortgage lender must evaluate the credit of an original borrower, it must examine the financial capacity of any person seeking to assume the economic obligation to pay a mortgage. The due-on-sale clause effectively and properly permits a lender to preclude an individual with inadequate credit from becoming the transferee of the real property security and thus the person with the primary economic incentive to discharge the mortgage obligation.

The Florida cases, such as the opinion below by the First District Court of Appeal and the opinion of the Second District Court of Appeal in First Federal Savings and Loan Association v. Lockwood, supra, recognize this aspect of a due-on-sale clause by permitting enforcement of the clause where a mortgagee can demonstrate that the new home occupant is not creditworthy. These cases do not, however, account for two other important lender interests (discussed immediately below), both of which are encompassed within the purposes of a due-on-sale clause and neither of which are associated with protection of the mortgagee's security.

2. Adjustment of Portfolio Yields

The second function of the due-on-sale clause is to permit mortgage lenders to adjust the yields of their mortgage portfolios. As interest rates paid to savers increase, the cost of funds to mortgage lenders increases more rapidly than do mortgage yields. This results in a decreasing return on the lender's overall mortgage portfolio.

The due-on-sale clause permits lenders to adjust their portfolio yields to reflect prevailing market conditions. If such periodic adjustments were not possible, lenders would be forced to increase significantly the interest rates charged on new mortgages. Under such conditions, old borrowers (and new assumptors) would receive a windfall at the expense of new borrowers. Indeed, the usual assertions by borrowers that due-on-sale clauses are simply an expression of lender greed display a marked lack of candor. Homeowners who seek to sell their homes subject to existing mortgage financing unquestionably receive a higher price than they would have received had their purchasers obtained new higher rate mortgage financing. This aspect of the due-on-sale policy dispute is essentially a question of whether new mortgage borrowers should be required to subsidize the sale price for homes sold by mortgagors who ignore the rights of a lender under a due-on-sale clause.[12/]

12/ A particularly eloquent analysis of this aspect of a due-on-sale clause can be found in Williams v. First Federal Savings and Loan Association of Arlington, 651 F.2d 910, 913-916 (4th Cir. 1981).

The ability of an institutional lender, such as a savings and loan association, to enforce a due-on-sale clause involves far more than an unwillingness to grant those seeking to assume mortgages an interest rate subsidy at the expense of new borrowers. If the periodic interest rate adjustments permitted by due-on-sale clauses were not possible, the financial viability of institutional lenders could be seriously undermined. These institutions obtain their funds from short-term sources (savings accounts and certificates of deposit), but have historically invested these funds in long-term mortgages, usually having 25-30 year terms. In periods of rising interest rates, the cost of funds to institutions rises far more rapidly than the average yields on their mortgage investments. If institutions are unable to obtain a periodic adjustment of mortgage portfolio yields by enforcing due-on-sale clauses, a risk of potential insolvency would result. FHLMC suggests to this Court that a threat to the financial viability of the thrift institution home mortgage delivery system presents a social problem of considerably more import than whether the McHaffies should receive an interest rate subsidy at the expense of the Weimans.

3. Secondary Mortgage Market Considerations

Finally, unrestricted enforcement of due-on-sale clauses enhances the attractiveness of investments in the conventional secondary mortgage market. This enhanced attractiveness increases the supply of funds available for borrowers seeking home mortgages.

The due-on-sale clause enhances the attractiveness of secondary mortgage market investments by effectively increasing the yield on mortgage pass-through securities sold by FHLMC and other secondary mortgage market sellers. FHLMC securities are virtually always issued at a discount (less than face value). Enforcement of the due-on-sale clause frequently results in prepayment of a mortgage and thus produces a more rapid return of capital to the security holder. The rapid pay back of a discounted mortgage obligation produces a higher effective yield by returning the discount component of a mortgage purchase over a shorter period of time.

An example of the impact of accelerated repayment of principal is illustrated by the following table:[13/]

9.750% Certificate Rate on Security

Price	Effective Yield of 30-Year Security Repaid In: 8 years	10 years	12 years	30 years
97 (3% discount)	10.08	10.04	10.02	9.96
98 (2% discount)	9.90	9.88	9.87	9.84

A lender's inability to enforce a due-on-sale clause would unquestionably result in an increase in the average life of mortgage pass-through securities and a corresponding decrease in the attractiveness of these securities. The potential adverse impact upon the secondary mortgage market would be considerable. As noted above, FHLMC alone has purchased $74.9

13/ The table is taken from page 145 of FHLMC's Net Yield Tables for Mortgage Participation Certificates (March, 1980 edition). The Mortgage Participation Certificate is FHLMC's principal secondary mortgage market pass-through security.

billion aggregate principal balance of conventional mortgages. These purchases were possible only because FHLMC could fund them through secondary market sales of mortgage pass-through securities.

In 1976, the Bank Board promulgated regulations endorsing the use and full enforcement of due-on-sale clauses by federal savings and loan associations. 12 C.F.R § 545.8-3(f), (g).[14/] In its justification statement accompanying the regulations, the Bank Board concluded that due-on-sale clauses are important to the financial stability of savings and loan associations. The Bank Board expressly adopted the three purposes discussed above as the bases for its policy judgment. 41 Fed. Reg. 6283 (Feb. 12, 1976).

The Bank Board's determination to authorize full enforcement of due-on-sale clauses was recently before the United States Supreme Court in Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982). The issue decided in de la Cuesta was whether federal savings and loan associations could enforce due-on-sale clauses pursuant to the Bank Board's regulations notwithstanding contrary state law. In deciding that the Bank Board's regulations did preempt state law, the United States Supreme Court recognized that the Bank Board's policy judgments concerning the need for full enforcement of due-on-sale clauses were legitimate. See 458 U.S. at 167-170.

14/ The regulations were originally codified at 12 C.F.R. § 545.6-11(f) and (g).

In 1982, the United States Congress extended the Bank Board's policy concerning due-on-sale clauses to virtually all lending institutions, state or federal. The Garn-St. Germain Act, Pub. L. No. 97-320, 96 Stat. 1469 (1982), expressly recognizes a national interest in enforcement of due-on-sale clauses so that long-term mortgage lenders may be able to update portfolio yields and have access to the nationwide secondary conventional mortgage market. As stated in the accompanying Senate Committee Report,

> For borrowers, due-on-sale restrictions provide an advantage for existing homebuyers at the expense of new homebuyers. New homebuyers pay for due-on-sale restrictions in one of two ways; either they pay an inflated price for an existing home with a lower interest rate assumable loan; or they pay a premium for a new loan for a new home, or an existing home without an assumable loan. In the first case, homesellers inflate the price of a home with an assumable loan to recover losses which result when they take back a second mortgage at a lower than market interest rate; or the price is increased to reflect the value of the assumable loan. In the second case, lenders charge a premium for new loans in states which restrict due-on-sale because earnings from the new loan must offset older loans (which cannot be turned over when due-on-sale clauses are unenforceable), and originating an assumable loan rather than a loan with an enforceable due-on-sale clause poses a greater risk to the lender, requiring a higher price for the mortgage. Thus, restrictions on due-on-sale clauses generally help existing homebuyers to the disadvantage of new homebuyers. Due-on-sale restrictions also encourage risky lending practices, outside the realm of the traditional mortgage credit delivery system, which intensify default risks. Finally, studies have concluded that these restrictions may lead to the complete disappearance of that traditional mainstay of American homeowners -- the long-term fixed rate mortgage.
>
> For lenders, due-on-sale restrictions further extend the lives of older low interest mortgages, and prevent lenders from increasing the yields on

> those loans at the time the property is transferred. A recent Due-on-Sale Task Force assembled by the Federal Home Loan Bank Board concluded that the imposition of due-on-sale restrictions nationwide would create, within two years, annual losses of $600 to $800 million for federal savings and loans, and $1.0 to $1.3 billion for all federal and state savings and loan associations.
>
> Due on sale restrictions also adversely affect secondary mortgage markets, which rely on uniform, homogenous mortgage documents to efficiently operate and provide mortgage money for lenders and homebuyers. State due-on-sale restrictions have caused the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Corporation to alter their investment practices in several states.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 20-21, reprinted in 1982 U.S. Code Cong. & Admin. News 3054, 3074-3075.

The foregoing demonstrates that there has been a consistent national policy, culminating in the Garn-St. Germain Act, permitting an institutional lender to enforce a due-on-sale clause without requiring that the lender demonstrate an impairment of its security. In light of this national policy, full enforcement of due-on-sale clauses can in no credible way be characterized as inequitable or unreasonable. Those relatively few state courts which have reached a contrary conclusion have, in FHLMC's opinion, ignored both the realities of the secondary mortgage market and the pressing need of an institutional mortgage lender to update portfolio yields. FHLMC respectfully suggests that this Court is free to reject the rationale of cases such as Lockwood and to hold that Florida lenders may enforce due-on-sale clauses in accordance with their terms and to further the three purposes for which they were designed.

C. The Decision Below Should Not Apply To Institutional Mortgage Lenders

Although the due-on-sale clause at issue is contained in a mortgage between two private individuals, the question was certified to this Court because the court below believed that this case "has far-reaching implications for certain financial institutions." Typewritten Opinion below, at p. 5. However, this case will have implications for financial institutions only if this Court chooses to extend any prohibition on due-on-sale clause enforcement to institutional mortgage originators. FHLMC urges, at a minimum, that any prohibition be confined to mortgages between private individuals.

The second and third reasons allowing for full enforcement of due-on-sale clauses, i.e., the need to update portfolio yields and to have effective access to the secondary mortgage markets, apply only to institutional mortgage lenders such as savings and loan associations, commercial banks and mortgage bankers.[15/] A private, individual mortgagee does not have a portfolio of long term assets supported by short term deposit liabilities nor does such an individual sell mortgages in the secondary mortgage market.[16/] This Court could remain consistent

15/ Mortgage bankers do not accept public deposits and thus do not have the same need as savings and loan associations and commercial banks to update portfolio yields. Mortgage bankers do, however, sell substantially all of the mortgages they originate and therefore must have effective access to the conventional secondary mortgage market.

16/ Indeed, FHLMC cannot purchase a mortgage unless that mortgage was originated by a federally insured financial institution or a federally approved mortgage banker. See 12 U.S.C. § 1454(a)(1).

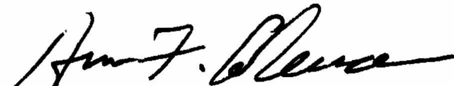
with the national policy of full enforcement of due-on-sale clauses by confining any prohibition upon enforcement to mortgages between private individuals.

Moreover, if this Court were to extend any prohibition upon due-on-sale clause enforcement to financial institutions, it would place Florida chartered savings and loan associations and commercial banks at a severe competitive disadvantage. The Garn-St. Germain Act permits unrestricted due-on-sale clause enforcement by federal savings and loan associations and, if so authorized by the Comptroller of the Currency, by national banks. 12 U.S.C. § 1701j-3(c)(1)(B). The Comptroller of the Currency has issued regulations permitting full due-on-sale clause enforcement by national banks. See 12 C.F.R. § 30.1. Federally chartered mortgage lenders will thus benefit not only from greater access to the secondary mortgage market, but also from the additional income generated by updated mortgage portfolios. This Court should seriously question the adoption of a judge-made rule which would put Florida chartered savings and loan associations and commercial banks at a serious competitive disadvantage when compared to their federally chartered counterparts.[17/]

17/ There must be literally billions of dollars of mortgages originated by and still owned by Florida state chartered institutions which would be adversely affected by this Court's decision. If this Court extends any due-on-sale clause enforcement prohibition to institutional mortgage lenders, these mortgages could be sold in the secondary market only at a substantial competitive disadvantage.

III. Conclusion

FHLMC believes that the certified question should be answered affirmatively for two separate, independent reasons. First, Florida is not a window period state. Decisions of the various Florida District Courts of Appeal cannot create a window period because a single Court of Appeal is not a court of statewide jurisdiction as required by the Garn-St. Germain Act. Second, this Court should adopt the national policy of unrestricted enforcement of due-on-sale clauses. This policy represents a well considered balance of the interests of mortgage lenders and all prospective home purchasers and is necessary if Florida institutional mortgage lenders are to have effective access to the conventional secondary mortgage market. At a minimum, any negative answer to the certified question should be limited to mortgages between private parties to avoid a competitive imbalance between Florida chartered and federally chartered financial institutions.



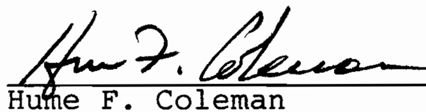
Hume F. Coleman
HOLLAND & KNIGHT
Post Office Drawer 810
Barnett Bank Building
Tallahassee, Florida 32302

Maud Mater
Senior Vice President and General Counsel
Garrett C. Burke
Associate General Counsel
Federal Home Loan Mortgage Corp.
1776 G Street, N.W.
Washington, D.C. 20006

Attorneys for Amicus Curiae
FEDERAL HOME LOAN MORTGAGE CORPORATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail, first class, postage prepaid, to Ray D. Helpling, Esquire, Scruggs & Carmichael, Post Office Drawer C, Gainsville, Florida 32602; and H. Reynolds Sampson, Esquire, Post Office Box 3457, Tallahassee, Florida 32315, this 26th day of June, 1984.



Hume F. Coleman