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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. 65,334 First District Court of Appeal Case No. AT-476

BRIEF OF AMICUS CURIAE DEVELOPERS DIVERSIFIED, LTD.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

This Brief is filed by Developers Diversified Ltd. ("DDL") in support of Respondents. DDL is currently facing foreclosure of a very substantial mortgage which contains a provision which arguably may be construed as a "due-on-sale" clause. DDL reasonably believed that under Florida law, enforcement of such a clause was subject to equitable defenses. Although the security of DDL's mortgagee was actually enhanced, rather than impaired, by certain recent transfers, the mortgagee is nevertheless attempting to foreclose.

It is the belief of DDL that the logical and scholarly legal principles that have been woven into the Florida common law in the form of equitable defenses to due-on-sale clause enforcement, should remain intact for mortgagors like the McHaffies and DDL who reasonably relied on the existence of such defenses.1/ Recent federal legislation2/ purports to preempt this area of law that has traditionally been the domain of the states. In its Argument, infra, DDL illustrates that the preemption of state

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1/ See generally McGuire, The Due-On-Sale Controversy: Restraints on Alienation and Federal Regulation of Real Estate Mortgages after de la Cuesta and the Garn-St. Germain Act, 1982 S. Ill. U.L.J. 487. McGuire recognizes Florida as a state which restricts the enforcement of due-on-sale clauses. Id. at 510.

2/ 12 U.S.C. § 1701j-3.

authority is not as pervasive as Petitioners would have this Court believe.3/

The Federal Home Loan Mortgage Corporation argues throughout its Amicus Curiae Brief that the federal government enacted comprehensive legislation designed to preempt state law and supposedly place state chartered banks on equal footing with federally chartered banks. However, this position completely ignores the rights and expectations of mortgagors in Florida. Its argument also underemphasizes the important fact that the federal legislation has a built in buffer, known as the "window period,"4/ to avoid the harsh result of suddenly emasculating state courts by cutting off their ability to entertain equitable defenses established by long-standing precedent. It is the belief of DDL that the integrity of Florida's common law of foreclosure has been threatened in this case. Florida's foreclosure common law can be protected by affirming the decision of the First District Court of Appeal.

3/ DDL had not received a copy of Petitioner's brief as of the date for filing this brief. DDL was granted leave to file this brief and appear as Amicus Curial prior to Petitioner's filing deadline, and has on three separate dates requested a copy of Petitioner's brief from its counsel, pursuant to suggestion of Clerk of Court, but no copy has been received.

4/ 12 U.S.C. § 1701j-3(c).

II. ARGUMENT

A. Summary of Issues and Argument

This Court should affirm the decision of the District Court of Appeal of Florida, First District, that properly held that the McHaffies' mortgage, executed on or about September 8, 1980, fell within the "window period" exception to the federal legislation that, under certain limited circumstances, preempts state law with respect to the enforcement of due-on-sale clauses. The specific federal legislation is the Garn-St.Germain Depository Institutions Act, Pub. L. 97-320, October 15, 1982, 96 Stat. 1469, codified at 12 U.S.C. § 1701j-3 (hereinafter "the Garn-St.Germain Act").

In pertinent part, the Garn-St.Germain Act provides that:

> [N]otwithstanding any provision of the Constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c) of this section, enter into and enforce a contract containing a due-on-sale clause with respect to a real property loan. (Emphasis added.)

12 U.S.C. § 1701j-3(b)(1). At issue in the instant case is the exception, known as the "window period" exception, created by subsection (c). It defines the "window period" in pertinent part as:

> beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which 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 resulting in a final judgment if such decision applies State-wide) prohibiting such exercise, and ending on October 15, 1982, the provisions of subsection (b) of this section shall apply only in the case of a transfer which occurs on or after the expiration of three years after October 15, 1982 . . . . (Emphasis added.)

12 U.S.C. § 1701j-3(c)(1).5/

As previously stated, the critical issue in this case is whether the law in Florida creates a "window period" exception and, if so, whether the McHaffies' loan, executed in September 1980, falls within the window period. As will be demonstrated in the following Argument, Florida is a "window period" state. The window opened in 1970 with the Second District Court of Appeal's decision in Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d DCA 1970).6/ Clark is

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5/ The Federal Home Loan Bank Board has construed the language of subsection (c) "prohibiting such exercise" as "a decision prohibiting such unrestricted exercise . . . ." 48 Fed. Reg. 21554 (1983) (to be codified at 12 C.F.R. § 591.2(p)(2)(ii)) (emphasis added). The Board specifically rejected an interpretation of subsection (c) of the Garn-St.Germain Act that would require a state decision which absolutely prohibited enforcement of due-on-sale clauses. 48 Fed. Reg. 21554, 21556-57 (1983).

6/ The decision in Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d DCA 1970) is recognized as the Florida decision which begins the window period for purposes of the Garn-St.Germain Act in the following scholarly publications: 2 Boyer, Florida Real Estate Transactions § 32.20[4][b] n.35p (1983 & Supp.); Rubin & Sklar, Garn-St.Germain Revisited, 58 Fla. B.J. 390 (1984); and Note, Garn-St.Germain: Congress Preempts Due-On-Sale--Fills Void Left by De La Cuesta, 12 Stetson L. Rev. 461, 471 (1983).

an appellate decision which applies state-wide as contemplated in the Garn-St.Germain Act.7/

B. Decisions of the Florida District Courts of Appeal Have State-Wide Applicability

The Garn-St.Germain Act requires that in order to qualify as a "window period" state, the restrictions on enforcement of due-on-sale clauses must have been created by constitutional provision, state statute, a decision of the state's highest court, or, if there is no decision by the state's highest court, by a state appellate court whose decision has state-wide applicability. 12 U.S.C. § 1701j-3(c)(1). Although Florida has no constitutional or statutory provision or Supreme Court decision specifically restricting the enforceability of due-on-sale clauses, all of the district courts of appeal have at least, endorsed restricted enforcement of due-on-sale clauses. See Clark v. Lachenmeier, supra; Home Fed. Sav. and Loan Ass'n of Palm Beach v. English, 249 So.2d 707 (Fla. 4th DCA 1971); First Fed. Sav. & Loan Ass'n v. Lockwood, 385 So.2d 156 (Fla. 2d DCA 1980); Woodcrest Apartments, Ltd. v. IPA Realty Partners Richardson Palmer, 3rd Investment Kq, 397 So.2d 364 (Fla. 1st DCA 1981); Consolidated Capital Prod. II Ltd. v. National Bank of N. Am., 420 So.2d 618 (Fla. 5th

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7/ See generally Sanders, Congress Legislates On "Due-On-Sale" Mortgage Clauses, 57 Fla. B.J. 53, 54 (1983).

DCA 1982); Washington Sav. & Loan Ass'n v. Portillo, 419 So.2d 805 (Fla. 3d DCA 1982).

The legislative history of § 1701j-3(c) indicates that the Senate Banking, Finance and Urban Affairs Committee, while expressing some doubt as to their conclusion, did not believe that Florida district courts of appeal decisions have state-wide impact:

> Those states having judicial decisions which do not apply state-wide, such as New York and Florida, will not be window period states . . . . Of course, just what the state law is in any particular state will be determined by the highest court of that state.

S. Rep. No. 536, 97th Cong., 2d Sess. at 22-23, reprinted in 1982 U.S. Code Cong. & Ad. News 3054, 3076-77. The same legislative history provides that Michigan should be recognized as a "window period" state even though the Michigan Supreme Court had not addressed the due-on-sale issue at the time the Garn-St.Germain Act was passed, and only a Michigan appellate decision8/ had restricted the exercise of due-on-sale clauses. S. Rep. No. 536, 97th Cong., 2d Sess. at 22-23, reprinted in 1982 U.S. Code Cong. & Ad. News 3054, 3076-77.

In determining whether Florida district court of appeal decisions apply state-wide, it is useful to

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8/ Nichols v. Ann. Arbor Federal Sav. & Loan Ass'n, 73 Mich. App. 163, 250 N.W.2d 804 (1977).

compare the Florida and Michigan appellate systems to ascertain why the Senate Committee failed to recognize that Florida district court of appeal decisions do in fact have state-wide application and precedence.

In Michigan, the court of appeal operates as a single court which sits in three judge panels located in the districts from which the judges are elected. Mich. Const. art. VI, § 8; 43 Mich. St. B.J., Nov. 1964, at 12, 13. Furthermore, each of the:

> [p]anels of this Court constitute courts of equal dignity, and a decision of one does not overrule a prior decision of another . . . . Under such circumstances, a trial court is entitled to choose which line of cases to follow.

Bay City Prosecutor v. Bay Dist. Judge, 102 Mich. App. 543, ___, 302 N.W.2d 225, 228 (1980). (emphasis added).

Therefore, at the time the Garn-St.Germain Act was enacted in 1982, different panels of the Michigan Court of Appeal could decide the same issue differently and the Michigan trial courts could pick and choose between the different panel decisions the particular case it would rely on as authority, until the decisions of the panels were brought to harmony by further appellate procedure.9/ Yet

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9/ Approximately one year following enactment of the Garn-St.Germain Act, the Michigan Court of Appeal adopted a procedure which it hopes will eliminate conflicting panel opinions from occurring subsequent to the date of the new procedure. See Lowry v. Sinai Hospital of Detroit, 129 Mich. App. 726, ___, 343

the Senate Committee nevertheless viewed a Michigan appellate court panel decision as having state-wide application.

The Florida appellate court system, while not the same as Michigan's, is comparable in effect. Although Florida is divided into five appellate districts:

> The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court] . . . .

Stanfill v. State, 384 So.2d 141, 143 (Fla. 1980). This Court has very narrow appellate jurisdiction because the district courts of appeal were never intended to be simply intermediate courts. Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958). As stated by the Fourth District Court of Appeal in State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976):

> [A] circuit court wheresoever situate in Florida is equally bound by a decision of a District Court of Appeal regardless of its appellate district . . . . In Florida the District Courts of Appeal are courts of final appellate jurisdiction except for a narrow classification of cases made reviewable by the Florida Supreme Court [citing Ansin v. Thurston, supra, and Taylor v. Knight, 234 So. 2d 156 (Fla. 1st DCA 1970)].

Id. at 52-53. Accord Bunn v. Bunn, 311 So.2d 387, 389 (Fla. 4th DCA 1975); Sanders, Congress Legislates On "Due-On-Sale" Mortgage Clauses, 57 Fla. B.J. 53, 54 (1983).

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footnote cont'd.

> N.W.2d 1, 3 n.4 (1983). Because this procedure did not exist at the time when Garn-St.Germain became law, reliance on it by Federal Home Loan Mortgage Corporation, ("FHLMC") in its Amicus Brief at 10 n.9, is misplaced.

Although the decision of one Florida district court of appeal is only persuasive authority for another district court of appeal, where there is no conflicting authority in other districts, the appellate decision clearly has state-wide applicability.10/ Florida's

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10/ The Mortgage Bankers Association of Florida ("MBA") and Federal National Mortgage Association ("FNMA") have misstated Florida law by asserting that a Florida district court of appeal decision is not binding authority as to:

> (c) trial courts outside the territorial limits of the district court rendering that decision (if its own district court has not spoken upon the issue).

MBA/FNMA Amicus Brief at 26-27. In fact, the law in Florida is exactly opposite from MBA/FNMA's proposition. A trial court outside the territorial limits of the district court rendering a decision is bound unless its own district court has spoken upon the issue differently from the district court rendering the decision. State v. Hayes, supra, 333 So.2d at 52-53.

The argument presented by MBA/FNMA in their amicus brief fails to recognize the proper context for the phrase "applies State-wide" as contained in the Garn-St.Germain Act at 12 U.S.C. § 1701j-3(c)(1). A decision by a Florida district court of appeal applies state-wide to all trial courts in every district if no other district court or Florida Supreme Court decision has addressed the particular issue. Stanfill v. State, supra, 384 So.2d at 143. In Florida, beginning with the Second District Court of Appeal's decision in Clark v. Lachenmeier, supra, no district court has varied from holding that due-on-sale clauses issued from non-federally chartered banks are enforceable only upon a showing of impairment of security. Because no district court has ever differed from the Second District Court's 1970 decision in Clark, that decision has always applied

system is therefore quite similar to Michigan's appellate system under which the decision of one panel is merely persuasive authority for a different panel.

The legislative history to the Garn-St. Germain Act not only fails to properly analyze the efficacy of decisions from Florida district courts of appeal in comparison to Michigan's, but also incorrectly concluded that the window period in the State of Arizona opened with a 1978 Arizona Supreme Court decision. S. Rep. No. 536, 97th Cong., 2d Sess. at 22, reprinted in 1982 U.S. Code Cong. & Ad. News 3054, 3076. The Arizona Supreme Court recently held in Scappaticci v. Southwest Sav. & Loan Ass'n, 135 Ariz. 456, ___, 662 P.2d 131, 134 (1983), that in fact the window period for purposes of the Garn-St.Germain Act opened with the 1971 Arizona intermediate court of appeal decision of Baltimore Life Ins. Co. v. Harn, 15 Ariz. App.

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footnote continued

state-wide to each and every trial court in every district in Florida. To argue that such a district court decision does not apply state-wide merely because a different district court might decide the issue differently (even where all five districts have endorsed restricted enforcement of due-on-sale clauses) is as illogical as arguing that a Michigan appellate panel decision (or an Arizona appellate court decision, see infra at 10-11), does not apply state-wide because that state's supreme court might decide the issue differently thereby reversing or overruling the intermediate court's decision. The position of MBA/FNMA actually seeks to defeat the plain language of the Garn-St.Germain Act once the logical extensions of the argument are examined as above.

78, 486 P.2d 190 (1971), petition for review denied, 108 Ariz. 192, 494 P.2d 1322 (1972).

Arizona has a single court of appeal which is divided into two divisions. Contrary to the statement in MBA/FNMA's Amicus Brief at 18 that one division's decision is "binding" on the other division, the Arizona Supreme Court clearly announced in Scappaticci, supra, that:

> Absent a decision by the Arizona Supreme Court compelling a contrary result, a decision by one division of the Court of Appeals is persuasive with the other division.

Id. at 135 Ariz. at ___, 662 P.2d at 136 (emphasis added). Although the decision of one division of the Arizona Court of Appeal is merely persuasive with the other division, the Arizona Supreme Court nevertheless firmly held that the 1971 appellate decision, restricting the enforcement of due-on-sale clauses, applied state-wide and triggered the opening of the window period. Id. at ___ 662 P.2d at 135-36.

It is readily apparent that little weight should be given by this Court to the comment in the legislative history to the Garn-St.Germain Act that decisions of the Florida district courts of appeal do not have state-wide application. In fact, it is abundantly clear, in light of the decisions in Stanfill, supra; Ansin, supra; Hayes, supra; and Bunn, supra, that the opinions of the Florida

district courts of appeal apply state-wide within the meaning of the Garn-St.Germain Act's "window period" exception, as codified in 12 U.S.C. § 1701j-3(c). Florida is, therefore, a window period state like Michigan and Arizona.

C. The Window Period in Florida Opened With the 1970 Second District Court of Appeal Decision In Clark v. Lachenmeier

The regulations promulgated pursuant to the Garn-St.Germain Act are of material assistance in determining the type of state law which prohibits the unrestricted enforcement of due-on-sale clauses within the meaning of the Garn-St.Germain Act. The regulations provide in relevant part that:

> (3) categories of state law which create window periods by prohibiting the unrestricted exercise of due-on-sale clauses upon outright transfers of property securing loans subject to such state law restrictions include laws or judicial decisions which permit the lender to exercise his option under a due-on-sale clause only where:
>
> > (i) The lender's security interest or the likelihood of repayment is impaired . . . .

48 Fed. Reg. 21,554 (1983) (to be codified in 12 C.F.R. § 591.2(p)).

Florida judicial decisions limiting a mortgagee's right to foreclose to instances where the mortgagee can show impairment of its security existed as early as 1955. See St. Martin v. McGee, 82 So.2d, 736, 737 (Fla. 1955).

Subsequent to the St. Martin decision, and citing the same, the Second District Court of Appeal limited the enforceability of what was nearly synonymous with a due-on-sale clause that provided:

> [I]n the event of transfer of ownership of the above described property . . . the mortgagee has the right and privilege of accepting or rejecting, or passing on credit, etc. of such successor and ownership . . . .

Clark v. Lachenmeier, supra, 237 So.2d at 584. In Clark, the mortgagees sought to foreclose based upon a failure of the mortgagor to give them notice of the sale of the property:

> They [mortgagees] purported to declare the full amount due to be then due and payable under the note and mortgage and demanded that if the amount due was not paid within a time set by the Court, that the property be sold and a deficiency judgment entered . . . .

Id. The Second District did not believe that the clause accelerated maturity of the whole debt merely upon sale of the property, but that the clause did require the mortgagees' consent before the property could be sold. Notwithstanding the fact that the mortgagor breached the mortgage clause by selling the property without the mortgagee's prior approval, the Second District Court of Appeal affirmed the dismissal of the mortgagees' foreclosure action because they had failed to show their security was impaired by the transfer. Id. at 585.

Although the mortgage clause in Clark might properly be classified a "prior consent" clause,11/ Clark is nevertheless recognized as the first Florida appellate decision, in a series of similar decisions, restricting the enforcement of due-on-sale clauses.12/

11/ The Garn-St.Germain Act defines a due-on-sale clause as a contractual provision that permits acceleration of a loan at the lender's option if the secured property, or an interest therein:

> is sold or transferred without the lender's prior written consent;

12 U.S.C. 1701j-3(a)(1). The Clark court's refusal to permit foreclosure upon breach of the prior consent clause, absent a showing that the lender's security had been impaired, clearly meets the spirit of the required state-wide restrictions which trigger opening of the window period.

12/ See supra note 5.

The Minnesota Supreme Court recently addressed issues similar to those of the instant case in interpreting the law of its state with respect to enforceability of due-on-sale clauses since passage of the Garn-St.Germain Act. In Viereck v. Peoples Sav. & Loan Ass'n, 343 N.W.2d 30 (Minn. 1984), the court acknowledged that it had not directly addressed the issue of the enforceability of due-on-sale clauses in owner-occupied residential mortgages originated or transferred prior to the Garn-St.Germain Act. Id. at 35. The court reasoned, however, that because earlier cases restricted acceleration of mortgages on investment property except for protection against impairment of the lender's security interest, that:

> If the precise issue we have here before us had been presented prior to June 1, 1979, we conclude this court would have held that an acceleration of the balance due on a conventional mortgage on borrower-occupied

The series of Florida district court of appeal decisions, subsequent to Clark, that limit the enforceability of due-on-sale clauses to instances where the mortgagee can prove impairment of security can be easily traced. For example, in Home Federal Sav. & Loan Ass'n of Palm Beach v. English, 249 So.2d 707 (Fla. 4th DCA 1971), the Fourth District Court of Appeal affirmed the lower court's decision refusing to enforce a due-on-sale clause where the lender had failed to allege that its security was impaired by the conveyance. The lower court in English was obviously following what it believed to be the law in Florida, established one year earlier in Clark v. Lachenmeier.

It is readily apparent from more recent Florida district court of appeal decisions that at least since 1976, mortgagees could not enforce their due-on-sale clauses absent a showing that their security was

footnote cont'd.

> residential property was per se unreasonable absent a valid credit or security interest risk. Since neither regulation 12 C.F.R. § 545.8-3(f) (1982) [applicable only to federally chartered banks] nor the Garn Act is retroactive in application so as to provide for federal preemption over Minnesota law then existing, we affirm [the unenforceability of the due-on-sale clauses].
>
> Id. at 36.

impaired. This was made clear in Orange Federal Sav. & Loan Ass'n v. Dykes, 433 So.2d 642 (Fla. 5th DCA 1983), which expressly refused to strictly enforce a due-on-sale clause in the absence of any substantial impairment to the security of the mortgage. Id. at 643. The Fifth District Court of Appeal cited St. Martin v. McGee, supra, and Home Federal Sav. & Loan Ass'n of Palm Beach v. English, supra, when it held, Id. at 643, that the law in Florida prior to 1976 required a showing of impairment before a due-on-sale clause could be enforced. The language in Orange Federal supports the proposition that early Florida cases opened the Garn-St.Germain Act's "window period" for mortgages executed subsequent to the rendering of those opinions.13/

Prior to the September, 1980 purchase-money mortgage executed by the McHaffies in favor of the Weimans, the Second District Court of Appeal decided First Federal Sav. & Loan Ass'n of Englewood v. Lockwood, 385 So.2d 156

13/ The Fifth District Court of Appeal, in denying strict enforcement of the due-on-sale clause, was specifically concerned with protecting against:

> the deprivation or diminution of rights vested under state law by the unrestricted enforcement of due-on-sale acceleration clauses.

Orange Federal Sav. & Loan Ass'n v. Dykes, supra, 433 So.2d at 643.

(Fla. 2d DCA 1980). In refusing to strictly enforce a due-on-sale clause without the mortgagee showing impairment of security, the court made clear that the law relied upon was well established by stating:

> Florida courts recognize that a lender has the right to accelerate a mortgage when the violation of the acceleration provision goes to the impairment of the lender's security. They require that the lender in a foreclosure action bear the burden of demonstrating legitimate grounds for refusal to accept the transferee. By so doing, our courts protect borrowers by providing them with equitable defenses in equitable accelerations by lenders. Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d DCA 1970). This approach is based on the historical purpose of acceleration clauses, which is to protect the security of lenders.

Id. at 159. The Lockwood court not only relied upon the 1970 decision in Clark v. Lachenmeier, supra, but also upon decisions which the Orange Federal, supra, court relied upon, including St. Martin v. McGee, supra, and Home Federal Sav. & Loan Ass'n of Palm Beach v. English, supra.

As stated in First Federal Sav. & Loan Ass'n of Gadsden County v. Peterson, 516 F.Supp. 732 (N.D. Fla.), clarified in other respects, 521 F.Supp. 416 (N.D. Fla. 1981), rev'd on other grounds, 707 F.2d 1217 (11th Cir. 1983):

> Lockwood stated the traditional use of due-on-sale clauses and a court's power to enforce or refuse to enforce them.

516 F.Supp. at 735 (emphasis added).

In yet another case where a Florida district court of appeal refused strict enforcement of a due-on-sale clause, the court held that Lockwood merely:

> adopted previous Florida decisions requiring the lender to demonstrate legitimate grounds for refusal to accept the transferee, in particular impairment of security, as an essential element of plaintiff's right to foreclose a mortgage.

Consolidated Capital Properties, II, Ltd. v. Nat'l Bank of North America, 420 So.2d 618, 621 (Fla. 5th DCA 1982) (emphasis added); citing, Clark v. Lachenmeier, supra; St. Martin v. McGee, supra; Home Federal Sav. & Loan Ass'n of Palm Beach v. English, supra; accord, Woodcrest Apartments, Ltd. v. IPA Realty Partners Richardson Palmer, 3rd Investment Kg, 397 So.2d 364 (Fla. 1st DCA 1981) (also citing Lockwood and Clark).

The foregoing cases demonstrate that the Florida courts have consistently refused to strictly enforce due-on-sale clauses in mortgages. It is equally clear that the same decisions rely upon Clark v. Lachenmeier, supra, as well as the decisions handed down subsequent to the 1970 Clark decision. Since Florida courts have consistently followed the lead of Clark in refusing strict enforcement of due-on-sale clauses, those residents of Florida who executed mortgages subsequent to the 1970 Clark decision, must be deemed to have reasonably relied on the fact that the due-on-sale clauses, if present in their mortgages, were

not strictly enforceable.14/ It is precisely this class of person for whom the "window period" exception was created by Congress in enacting the Garn-St.Germain Act:

> A blanket federal preemption of state restrictions on the enforcement of due-on-sale clauses would, however, have an unfair impact on those home buyers who, despite the contractual terms of their mortgage contracts, relied on state due-on-sale restrictions and reasonably believed they had assumable loans.

S. Rep. No. 536, 97th Cong., 2d Sess. at 22, reprinted in 1982 U.S. Code Cong. & Ad. News 3054, 3076.

In both the FHLMC and the MBA/FNMA Amicus Briefs, a large portion of their respective arguments are devoted to explaining why banks should be permitted to use due-on-sale clauses offensively, as opposed to defensively, in order to enhance the value of their mortgage loan portfolios. However, Florida has specifically adopted the position, beginning with Clark in 1970, that due-on-sale clauses should be used by lenders only to defend their

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14/ Articles published in this area regarding Florida's approach to enforcing due-on-sale clauses in the light of the Garn-St.Germain Act also express the opinion that the 1970 Clark decision began the series of precedents refusing strict enforcement of due-on-sale clauses. 2 Bower, Florida Real Estate Transactions § 32.20[4][b] n.35p (1983 & Supp.); Rubin & Sklar, Garn-St.Germain Revisited, 58 Fla. B.J. 390 (1984); and Note, Garn-St.Germain: Congress Preempts Due-On-Sale--Fills Void Left by De La Cuesta, 12 Stetson L. Rev. 461 (1983).

security when the same is in danger of impairment.15/ This Court would not be changing the status of the law in Florida, nor would it be creating hardships for state chartered banks and other lenders subject to the window period provisions, by affirming the First District Court of Appeal. Restrictions on the enforcement of due-on-sale clauses have long been recognized by Florida courts, and it was Congress that created the window period exception for non-federally chartered banks. Any asserted inequality in position between federally chartered banks and state chartered banks certainly has not been created by the lower court's decision in Weiman v. McHaffie, but rather has been quite consciously imposed by federal statute.

Although many classifications exist for loans, they can generally be identified to one of two types: 1) variable interest rate loans, and 2) fixed interest rate loans. A lender is entitled to choose or bargain for whichever of these two types of loans it will enter. Should the lender require a variable rate, it will receive the benefit of rising interest rates on the loan whose interest "floats"

15/ As stated in Lockwood, supra, providing borrowers with equitable defenses to the enforcement of due-on-sale clauses:

> is based on the historical purpose of acceleration clauses, which is to protect the security of lenders.

Id. at 385 So.2d 159 (emphasis added).

with the market rate, and also face the risk of falling interest rates which can drop below the initial loan rate. If the lender chooses to enter a fixed rate loan, both lender and borrower face certain risks, similar to risks faced by borrower and lender with variable rate loans. Both parties are taking a chance, the lender that rates will not rise and the borrower that rates will not fall.

If a fixed rate loan is transferred to a different party, assuming no security impairment, the lender's position is not changed or affected. Once a lender has agreed to a fixed rate for a fixed term of years, its expectation interest in the loan is sealed. To argue as the Amici for Petitioners have that due-on-sale clauses should be used by lenders offensively to accelerate loans due to changes in the market interest rates which make the set rate unfavorably low, is to argue that fixed rate loans are in fact variable rate loans with changes in the loan's interest rate available only when the lender would like to change the rate. Amici for Petitioner appear to argue that lenders should be entitled to override the initial expectation interests of both borrower and lender and convert fixed rates to higher rates on the transfer of an interest in the property so that the lender can obtain what it presently wishes it had bargained for.

In the present case, the Weimans and McHaffies entered into a fixed term loan, unassumable

without the prior consent of the Weimans. But the Weimans refused to even consider a single prospective assumer of the loan, indiscriminately denying consent. Transcript at 33, see Appendix "A". Yet the Weimans would not be damaged by an assumption of the loan (assuming no impairment of security), as they had consented to the interest rate and term from the loan's inception. Carrying such loans to the termination of their term cannot change the lender's position, it can only enforce the parties' original bargain.

The importance of protecting the reasonable expectations of persons entering into mortgage agreements since the 1970 Clark decision is obvious. Of equal clarity is the need for this Court to protect the integrity of the decisions to date of the district courts of appeal by holding in this case that Florida is a "window period" state under the Garn-St.Germain Act and that the window opened in 1970 when Clark v. Lachenmeier was decided.

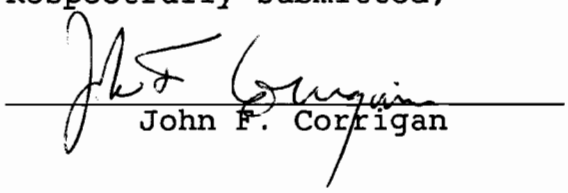
III. CONCLUSION

Pursuant to the well-established doctrines of the State of Florida, decisions of its district courts of appeal represent the law of Florida and have state-wide applicability within the meaning of 12 U.S.C. § 1701j-3(c), the codification of Section 341(c) of the Garn-St.Germain Act. In accordance therewith, contracts involving real

property loans that were entered into subsequent to the 1970 Clark v. Lachenmeier decision benefit from the "window period" exception of the Garn-St.Germain Act, and, as such, these particular due-on-sale clauses are not strictly enforceable until three years after October 15, 1982.

In the instant case, the First District Court of Appeal's decision, refusing strict enforcement of the due-on-sale clause in the mortgage given by the McHaffies to the Weimans, should be affirmed pursuant to the well-established line of cases in Florida prohibiting strict enforcement of due-on-sale clauses in mortgage agreements. The equitable defenses that have heretofore been available in the State of Florida in foreclosure actions should continue to be available for "window period" loans.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amicus Curiae Developers Diversified, Ltd. was mailed this 13th day of July, 1984, to Ray D. Helpling, Esquire, Counsel for Petitioners, Scruggs & Carmichael, P. O. Drawer C, 1 Southeast First Avenue, Gainesville, Florida 32601; H. Reynolds Sampson, Esquire, Counsel for Respondents, 313 Williams Street, Suite 10, Tallahassee, Florida 32315; Hume F. Coleman, Esquire, Counsel for Amicus Curiae, Federal Home Loan Mortgage Corporations, Holland & Knight, P. O. Drawer 810, Tallahassee, Florida 32302; and Nancy E. Swerdlow, Esquire, Counsel for Amicus Curiae, Mortgage Bankers Association of Florida and the Federal National Mortgage Association, Steel, Hector & Davis, 1400 Southeast Bank Building, Miami, Florida 33131.