IN THE SUPREME COURT OF FLORIDA

EMIL J. WEIMAN, et ux.,	)	
	:	
Petitioners,	)	
	:	
VS	)	CASE NO. 65,344
	:	
THOMAS N. McHAFFIE, et ux.,	)	
	:	
Respondents.	)	
	:	

APPEAL FROM THE FIRST DISTRICT COURT
OF APPEAL CASE NO. AT-476 PURSUANT TO RULE 9.120

Initial Brief of Petitioner

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I. WHETHER, DESPITE CONGRESS' INDICATION THAT FLORIDA IS NOT A "WINDOW PERIOD" STATE, FLORIDA SHALL BE DEEMED TO BE A "WINDOW PERIOD" STATE WITHIN THE PROVISIONS OF THE GARN-ST. GERMAIN DEPOSITORY INSTITUTIONS ACT OF 1982 SUCH THAT A MORTGAGE CONTAINING A DUE-ON-SALE CLAUSE SHALL NOT BE ENFORCEABLE WHERE THE ATTEMPTED TRANSFER OCCURS SUBSEQUENT TO THE EFFECTIVE DATE OF THE ACT (OCTOBER 15, 1982) BUT BEFORE TERMINATION OF THE "WINDOW PERIOD" (OCTOBER 15, 1985) WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WOULD BE IMPAIRED BY THE TRANSFER.

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PREFACE

This is an appeal invoking the discretionary jurisdiction of the Supreme Court of Florida pursuant to Rule 9.120 to review a decision of the First District Court of Appeal. The decision passes upon a question certified to be of great public importance.

The Petitioners were the Appellants before the First District Court of Appeal and the Defendants in an action for declaratory judgment.

Herein the parties shall be referred to as follows:

PETITIONERS: Weimans
Appellants
Defendants
Mortgagees
Lenders

RESPONDENTS: McHaffies
Appellees
Plaintiffs
Mortgagors
Borrowers

The following symbol will be used: "(R)" Record on Appeal.

STATEMENT OF THE CASE

The Plaintiffs filed a Summons and Complaint for Declaratory Judgment (R 1-3), and the Defendants responded with their Answer and Affirmative Defenses (R 4-5). Plaintiffs filed a Motion to Strike Insufficient Defenses (R 6) and Request for Admissions (R 7-8) which Defendants answered (R 15-16).

The cause was heard before the Honorable R. A. Green, Jr. of the Eighth Judicial Circuit, Alachua County, Florida who entered his Declaratory Judgment on June 21, 1983 (R 17-18). Defendants thereafter perfected their appeal to the First District Court of Appeal (R 19-21).

The First District Court of Appeal filed its opinion on April 6, 1984, remanding to the Trial Court for a determination on the issue of whether the Appellants' security would be impaired if the property were transferred and certifying to this Court the following question as one with far reaching implication for certain financial institutions and the people of this State:

> IS A DUE-ON-SALE CLAUSE IN A FLORIDA MORTGAGE EXECUTED ON SEPTEMBER 8, 1980, TO A PRIVATE LENDER OR SELLER, ENFORCEABLE AS TO AN ATTEMPTED TRANSFER OCCURRING SUBSEQUENT TO OCTOBER 15, 1982, BUT BEFORE OCTOBER 15, 1985, WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WILL BE IMPAIRED BY THE TRANSFER?

Appellants filed their Motion for Rehearing or for Clarification pursuant to Rule 9.330 which was denied. Thereafter, Appellants filed notice to invoke the discretionary jurisdiction of this Court pursuant to Rule 9.120 to review the decision of the First District Court of Appeal which passes upon a question certified to be of great public importance.

STATEMENT OF THE FACTS

The McHaffies, Respondents in this Court, purchased a home from the Weimans, the Petitioners, on September 8, 1980; and, the Weimans accepted a Purchase Money Mortgage from the McHaffies which contained the following provision:

> If any part of the property or any interest therein is sold or transferred by the Mortgagor without the prior written consent of the Mortgagee, the Mortgagee, at the Mortgagee's option, may declare all sums secured by this Mortgage to be immediately due and payable.

The McHaffies sought a Declaratory Judgment as to whether this provision was enforceable. The Weimans asserted that the clause was enforceable pursuant to the Garn-St. Germain Depository Institutions Act of 1982 or, in the alternative, on the basis of contract theory.

QUESTION PRESENTED

IS A DUE-ON-SALE CLAUSE IN A FLORIDA MORTGAGE EXECUTED ON SEPTEMBER 8, 1980, TO A PRIVATE LENDER OR SELLER, ENFORCEABLE AS TO AN ATTEMPTED TRANSFER OCCURRING SUBSEQUENT TO OCTOBER 15, 1982, BUT BEFORE OCTOBER 15, 1985, WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WILL BE IMPAIRED BY THE TRANSFER?

ARGUMENT

With all due respect Petitioners' request that this Court consider restating the question in order that it address the issue of whether Florida shall be deemed to be a "window period" State within the provisions of the Garn. St. Germain Depository Institutions Act of 1982 rather than whether that Act should operate retroactively. Therefore, Petitioners suggest that the question certified be reframed as follows:

> WHETHER, DESPITE CONGRESS' INDICATION THAT FLORIDA IS NOT A "WINDOW PERIOD" STATE, FLORIDA SHALL BE DEEMED TO BE A "WINDOW PERIOD" STATE WITHIN THE PROVISIONS OF THE GARN-ST. GERMAIN DEPOSITORY INSTITUTIONS ACT OF 1982 SUCH THAT A MORTGAGE CONTAINING A DUE-ON-SALE CLAUSE SHALL NOT BE ENFORCEABLE WHERE THE ATTEMPTED TRANSFER OCCURS SUBSEQUENT TO THE EFFECTIVE DATE OF THE ACT (OCTOBER 15, 1982) BUT BEFORE TERMINATION OF THE "WINDOW PERIOD" (OCTOBER 15, 1985) WITHOUT A SHOWING THAT THE MORTGAGEE'S SECURITY WOULD BE IMPAIRED BY THE TRANSFER.

The Garn-St. Germain Depository Institutions Act of 1982 (hereinafter "Garn Act") (P.L. No. 97-320 U. S. Code Cong. & Adm. News, Vol. 1) was enacted by the Senate and the House of Representatives of the United States of America and was signed into law by President Reagan on October 15, 1982. The Act includes an

unqualified authorization for "due-on-sale" enforcement by all types of mortgage lenders (12 USC §1701;j-3.) Its purpose is to revitalize the housing industry by strengthening the financial stability of home mortgage lenders and to ensure the availability of home mortgage loans.

Section 341 of the Garn Act specifically applies to the lender's ability to use due-on-sale clauses within their contracts and mandates a federal preemption of state laws and judicial decisions which inhibit the enforcement of due-on-sale clauses in real property loans. The Garn Act provides, "notwithstanding any provision of the Constitution or laws (including the judicial decisions) of any state to the contrary, a lender may... enter into or enforce a contract containing a "due-on-sale" clause with respect to a real property loan". See Section 341(b)(1). (Emphasis added)

Section 341(a)(1) defines the term "due-on-sale clause" as a contract provision which authorizes a lender at its option to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent." Section 341(a)(2) defines the term "lender" as "a person or government agency making a real

property loan or any assignee or transferee, in whole or in part of such a person or agency." (Emphasis added) Section 341(b)(1) provides (as previously noted) that "not withstanding any provisions of the Constitution or laws (including judicial decisions) of any state to the contrary, a lender may, subject to subsection (c), enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan." (Emphasis added) Section 341(b)(2) provides that "except as otherwise provided in sub-section (d), the exercise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract."

A. FLORIDA IS NOT A "WINDOW PERIOD" STATE WITHIN THE PROVISIONS OF THE GARN ACT.

Petitioners assert that the exceptions enumerated in Section 341, subsection (c) of the Garn Act do not apply in Florida and those enumerated in subsection (d) do not apply in the instant case. Subsection (c) creates a "window period" of three years within which the Act's mandate does not apply in states where there is a constitutional provision or statute prohibiting or restricting the exercise of due-on-sale clauses or where the highest Court of a state has rendered a decision resulting in a final

judgment prohibiting such exercise (or if the highest Court has not so decided, the next highest Appellate Court has rendered a decision resulting in a final judgment if such decision applies state-wide).

The State of Florida does not have a constitutional provision or a statute which prohibits or restricts the parties from entering into or enforcing a due-on-sale clause, this Court has not spoken to the issue of restrictions on the enforcement of such a clause; and furthermore, Petitioners assert that at this time there is no Appellate Court decision having state-wide authority which controls the outcome in the instant case.

The First District's position is that, "Despite the fact that the draftsmen of this legislation felt that this law applies retroactively in Florida, we find that Florida falls within the definition of a 'window period' state." Petitioner asserts that this position is incorrect; first, because the Court inappropriately relied on First Federal Savings and Loan Association v. Lockwood, 385 So. 2d 156 (Fla. 2nd DCA 1980) and its progeny; second, because the legislative history of the Act is a strong indication of the Congress' intent and as such is highly persuasive; and third, because the Act is not retroactive in effect but prospective in effect as the Act merely terminates the prospective

right to find voidable the due-on-sale clause where the exercise of the right follows the effective date of the Act.

1. The Appellate Court's reliance on First Federal Savings and Loan Association v. Lockwood, is inappropriate as a basis for determining that Florida is a "window period" state.

The First District's opinion in the instant case indicates reliance on the statewide applicability of First Federal Savings and Loan Association v. Lockwood, 385 So. 2d 156 (Fla. 2nd DCA 1980) as modified by the United States Supreme Court's decision in Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 US 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) and the subsequent decisions of the other Florida District Courts of Appeal. Petitioner, however, asserts that Lockwood, which held a due-on-sale clause unenforceable by a federal lender absent a showing of impairment of the security interest, was overruled by the Supreme Court's decision in de la Cuesta. The First District overlooked or misapprehended the impact of de la Cuesta decision as is clearly set forth both in Washington Savings and Loan Association of Florida v. Concepcion Del Portillo, 419 So. 2d 805 (Fla. 3rd DCA 1982), and more specifically in First Home Federal Savings and Loan Association, Sebring, Florida v. Nance, 436 So. 2d 163 (Fla. 2nd DCA 1983).

In Concepcion Del Portillo, supra, the Court recognized the holding in de la Cuesta as overruling the decisions in Lockwood

and Consolidated Capital Properties II, Ltd. v. National Bank of North America, 420 So. 2d 618 (Fla. 5th DCA 1982). De la Cuesta held that (1) the Federal Home Loan Bank Board's due-on-sale regulation was meant to preempt conflicting state law limitations on the due-on-sale practices of federal saving and loan associations and (2) the applicable regulations do not confine a federal association's right to accelerate a loan to cases where the lender's security is impaired. Furthermore, in Concepcion Del Portillo the Court held that de la Cuesta overrules the cases which hold that Courts may, applying state equity law, refuse to enforce due-on-sale clauses in federal savings and loan association mortgage contracts.

And, in First Home Federal Savings and Loan Association, Sebring, Florida v. Nance, supra, where the mortgage contract was executed and delivered in 1977 and the property was transferred by Warranty Deed in 1980, the Court held that de la Cuesta decided in 1982 was dispositive regarding the enforceability of the due-on-sale clause of the mortgage without an allegation or proof that the transfer of the mortgaged property had impaired the lender's security. 436 So. 2d 163, 164. More specifically, the Second District recognized that de la Cuesta effectively overruled its own holding in Lockwood, supra.

Therefore, the Second District, which established the rule in Lockwood in 1980, has effectively abrogated its own rule and has recognized that de la Cuesta overrules Lockwood. Consequently, the Court's decision in Nance in 1983, supra, leaves Lockwood and its progeny neither with the viability of precedent nor the impact of statewide authority. Additionally, Petitioners assert that the resolution of the instant case is not controlled by Lockwood and its progeny as the mortgagee is a private lender.

2. The Legislative History of the Garn Act demonstrates that Florida is not a "window period" state.

In Spreights v. State, 414 So. 2d 574, 576 (Fla. 1st DCA 1982), and again in Watkins v Board of Regents, 414 So. 2d 583, 587 (Fla. 1st DCA 1982) the Court noted that, "One method of ascertaining the legislative intent is by tracing the legislative history of the act, the evil to be corrected, and the purpose of the enactment." [Citing State ex rel Register v. Safer, 368 So. 2d 620, 624 (Fla. 1st DCA 1979).] Here, as in Watkins, the legislative history of the Garn-St. Germain Act is strongly indicative of the legislature's intent: the drafters clearly intended for the Act to apply to mortgage contracts written prior to its enactment as to the enforceability of due-on-sale clauses in Florida.

State actions placing restrictions on the enforcement of due-on-sale clauses in home mortgages have created problems which the Congress sought to address. The following excerpt provides three justifications for upholding the enforceability of due-on-sale clauses:

> "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 in 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, home-sellers 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 can not 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 for 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."

U. S. Code Cong. and Adm. News, Vol. 3, Legislative History of P.L. 97-320 at pages 20-21.

Senate Report No. 97-536 clearly indicates the legislative intent with regards to the immediate effectiveness of the Garn-St. Germain Act in the State of Florida. That intent is expressed as follows:

"The Committee has not discovered Court decisions in any other states that would apply to trigger a window period. In several states, such as New York and Florida, Appellate Courts whose jurisdiction is not statewide have imposed restrictions on due-on-

> sale clauses, but the window period in this bill is not triggered by lower court decisions as the Committee was concerned with respecting the integrity of decisions that had statewide impact." U. S. Code Cong. and Adm. News, Vol. 3, Legislative History of P.L. 97-320, page 22. (Emphasis added)

and

> "Those states having judicial decisions which do not apply statewide, such as New York and Florida, will not be window period states." U. S. Code Cong. and Adm. News, Vol. 3, "Legislative History of P.L. 97-320, page 23. (Emphasis added).

Thus, it is abundantly clear that the U. S. Congress intended to enact Legislation to eliminate prior restrictions and therefore approve the enforcement of due-on-sales clauses as between an individual lender and home purchaser, subject only to specified exceptions.

3. The Garn St. Germain Act does not operate with retroactive effect in Florida.

The First District clearly misapprehended the Act as operating retroactively in Florida. The Act does not impair contractual rights, rather it validates the enforceability of the due-on-sale provision in this contract. There is no impairment of vested rights, first, because in the instant case there is no

vested right involved regarding non-enforceability of the due-on-sale clause; and second, because the effect of the Act eliminates the right to determine that the due-on-sale clause of the contract is voidable.

A law is retroactive if it takes away or impairs vested rights acquired under existing laws or if it creates a new obligation, imposes a new duty, or attaches a new disability regarding transactions or considerations already past. Herberle v. P.R.O. Liquidating Co., 186 So. 2d 280 (Fla. 1st DCA 1966). This is not the situation in the instant case where the parties acknowledged and agreed to the due-on-sale provision in the contract.

The Act is not an unconstitutional impairment of contract with retroactive effect because its effect is prospective. The due-on-sale provision of the contract was not, prior to the enactment of the Act, void but voidable. The Act terminates the prospective right to find voidable the due-on-sale clause where exercise of that right follows the effective date of the Act. Thus, the Act does not operate retroactively nor does it impair the contract. The Act operates prospectively to validate the due-on-sale

provision and its effect is to uphold the contract not to impair it.

B. THE DUE-ON-SALE PROVISION IS ENFORCEABLE UNDER A LIBERTY OF CONTRACT RATIONALE.

The mortgage clause at issue in the instant case reads as follows:

> "If any part of the property or any interest therein is sold or transferred by the mortgagor without the prior written consent of the mortgagee, the mortgagee at the mortgagee's option, may declare all sums secured by this Mortgage to be immeditely due and payable." (R-2)

In Clark v. Lachenmeir, 237 So. 2d 583 (Fla. 2nd DCA 1970), the Court required a mortgagee, a private party, to show impairment of its security interest in order for the due-on-sale clause to be enforceable. In Clark, however, in contrast to the clause at issue in the instant case, the provision in the Mortgage read as follows:

> "It is hereby agreed that in the event of transfer of ownership of the above described property that the Mortgagee has the right and privilege of accepting or rejecting, or passing on credit, etc. of such successor in ownership." Id at 584.

Thus, the clause in Clark provided for an absolute restraint on alienability, subjecting new owners to approval by the mortgagee,

whereas the clause in the instant case concerns only the time when the borrower must pay his obligation.

Although the First District found their decision in the instant case in accord with Scappaticci v. Southwest Savings and Loan Association, 662 P 2d 131 (Ariz. 1983), a careful examination of the state of the law in Arizona as compared with Florida should dispel any reliance on the course of action taken by the Supreme Court of Arizona. First, the State of Arizona was specifically recognized in the legislative history of the Garn Act as a state with a decision of state-wide applicability. U. S. Cong. and Adm. News, Vol. 3, Legislative History of P.L. 97-320, page 22. n. 3. Second, the Arizona Court noted that Arizona's restrictions on due-on-sale clauses were based on the premise that such clauses constituted an unreasonable restraint upon alienation and were void as against public policy. The Court, however, noted that parties may enter into such agreements as they deem necessary and that acceleration clauses are bargained for elements of mortgages, but that where the acceleration clause restricts the mortgagor's ability to dispose of his property it is a restraint against alienation.

Therefore, the First District's reliance on Scappaticci as a parallel situation to that in Florida is spurious on two

grounds; first, because the legislative history of the Act clearly indicates the Committee specifically differentiated between the status of the law in Florida and in Arizona; and second, because the Arizona Courts indicate approval of the due-on-sale clause as a bargained for element of a contract but disapproval where the clause restrains alienability. As noted, the due-on-sale provision as written in the instant case merely controls when the borrower must pay his obligation and does not hinder alienability.

Additionally, the enforceable due-on-sale clause prevents borrowers from converting the advantage of a low interest rate mortgage into an even greater advantage; for this Court to hold that a due-on-sale clause in unenforceable, absent a showing of impairment of security, would provide a mortgagor with a windfall. The mortgagor would be able to use his favorable mortgage interest rate to establish a better selling price for his property than would the seller of property which is free from encumbrances.

It is a fundamental principle that competent parties have the utmost liberty of contracting and that their agreements which are entered into voluntarily and fairly will be held valid and enforced by the Courts. 10 Fla. Jur. 2d, Constitutional Law §243, 11 Fla. Jur. 2d, Contracts §81. This right is subject only to the limitations that the contract must not be illegal or be against

public policy. 11 Fla. Jur. 2d, Contracts §81 and cases cited therein. As stated previously, there is no constitutional provision or statute in the State of Florida which prohibits or limits the enforcement of due-on-sale clauses within mortgage contracts. Furthermore, to be void as against public policy, a contract must appear "injurious to a public interest" or have a "bad tendency" or contravene established interests of society. 11 Fla. Jur. 2d, Contracts §87, §88 and cases cited therein. However, Courts must use caution in declaring a contract or portion thereof void on the grounds of public policy due to a greater public concern that freedom of contract not be lightly interferred with, thus this action should only occur in the most clear cases. 11 Fla. Jur. 2d, Contracts §88 and cases cited therein.

A stipluation in a mortgage providing that the whole debt secured thereby is to become due and payable on failure to comply with a condition of the contract of mortgage is a legal, valid, and enforceable stipulation; and such provisions are not against public policy or in the nature of a forfeiture or a hard contract such that it would be unconscionable for a court of equity to enforce. Campbell v. Werener, 232 So. 2d 252 (Fla. 3rd DCA 1970) citing Treb Trading Co. v. Green, 102 Fla. 238, 135 So. 510 (Fla. 1931), 37 Fla. Jur. 2d, Mortgages §207.

In the instant case, as in Williams v. First Federal Savings and Loan Association of Arlington, 651 F2d 910 (4th Cir. 1981), the due-on-sale clause does not require the lender's consent to a sale, it only permits the lender at its option to exercise the due-on-sale clause if the borrower elects to sell the property. And, in the event that the due-on-sale clause is activated, the resulting acceleration of the principal balance does not give rise to any charge, premium or penalty. Id at 928. The use of a due-on-sale clause in a mortgage contract does not hinder alienability in any way, it concerns only the time when the borrower must pay his obligation. Thus, the homeowner whose property is subject to a mortgage which contains a due-on-sale provision is as free to sell his property as one whose property is free and clear of any encumbrance.

The plain and unambiguous language used in this contract must be construed to mean just what the language implied and nothing more. Camichos v. Diana Stores Corp., 157 Fla. 349, 25 So. 2d 864. (Fla. 1946); Bay Management, Inc. v. Beau Monde, Inc., 366 So. 2d 788 (Fla. 2nd DCA 1979); 11 Fla. Jur. 2d Contract §114. Courts do not have the power to make contracts for the parties or to rewrite, alter, or change them when made. Home Development Co. v. Bursani, 178 S. 2d 113 (Fla. 1965), 11 Fla. Jur. Contracts §101

and cases cited therein; and if the language of a contract is clear and unambiguous, as in the instant case, it does not call for judicial interpretation. Gulf Cities Gas Corp. v. Tangelo Park Service Co., 253 So. 2d 744 (Fla. 4th DCA 1971), 11 Fla. Jur. 2d, Contracts §101, and cases cited therein. And, the Courts may not concern themselves with the "wisdom or folly of contracts which they are called upon to construe", thus they "cannot protect parties sui juris from the results of improvident lawful agreements". 11 Fla. Jur. 2d, Contracts §101 and cases cited therein; Rodeway Inns of America v. Alpaugh, 390 So. 2d 370 (Fla. 2nd DCA 1980).

In O'Connell v. Dockendorff, 415 So. 2d 35 (Fla. 2nd DCA 1982), which preceded the enactment of the Garn Act, the Court upheld the enforcement of a challenged provision under a sanctity of contract rationale. The O'Connell Court held that a clause which adjusted the rate of interest upward to prevailing rates upon assignment or assumption was enforceable. Furthermore, the Court noted that sui juris parties may establish the term of an agreement without subsequent alteration by the Courts and that this was a bargained for term of the mrotgage contract. [Citing Century Federal Savings and Loan Association v. Madorsky, 353 So. 2d 868 (Fla. 1st DCA 1977), cert. den., 359 So. 2d 1217 (Fla.

1978) and Sapienza v. Bass, 144 So. 2d 520 (Fla. 3rd DCA 1962).] Two aspects of the O'Connell decision indicate that the Court accepted the sanctity of contract theory. First, the Court enforced the bargained for and unambiguous obligations and rights of the parties; and second, consideration of security impairment was not a decisive factor in the decision. Thus, the Court in O'Connell found that the intent of the parties was clearly expressed in the contract and that the parties should be allowed the benefit of their bargain. Id. at 37.

C. THE UNITED STATES SUPREME COURT'S DECISION IN FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION V. DE LA CUESTA, MANDATES THE CONTENTION THAT STATE LAWS HAVE BEEN PREEMPTED BY THE GARN ACT AND THAT CONGRESS HAS THE AUTHORITY TO DO SO.

In construing the Act, Congress recognized the decision in Fidelity Federal Savings and Loan Association v. de la Cuesta, supra, where the Court held that federal regulations had preempted state legislative and case law as to due-on-sale clauses for federal savings and loan associations, as creating a disadvantage to other lenders as well as uncertainty regarding their ability to enforce due-on-sale provisions. This displacement of state restrictions on due-on-sale clauses eliminates this confusion and places all lenders in a position of competitive equality. U.S.

Code Cong. & Adm. News, Vol. 3, Legislative History of P.L. 97-320 at page 21.

Additionally, the reasoning of the Court in de la Cuesta provides additional support for upholding the enforceability of a due-on-sale clause under the Garn Act. First, the doctrine of federal preemption arises from the Supremacy Clause of the United States Constitution, "This Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land." U.S. CONST. ART. VI, cl 2. The preemptive intent of Congress may be either express or implied, and is compelled whether Congress' command is explicitely stated in the statutes' language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). Absent explicit preemptive language, the preemptive intent of Congress may be inferred in several ways. The "scheme of federal regulation may be so persuasive as to make reasonable the inference that Congress left no room for the state to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). An "Act of Congress may touch a field in which the Federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or "the object sought to be obtained by Federal

law and the character of obligations imposed by it may reveal the same purpose." Id. Where Congress has not completely displaced state law in a particular area, the state law is superceded to the extent of an actual conflict with the federal law. A conflict arises where "compliance with both federal and state regulations is a physical impossibility", Florida Lime and Avacado Growers v. Paul, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941). See also Jones v. Rath Packing Co., 430 U. S. 519, 526, 51 L. Ed. 2d 604, 97 S. Ct. 1305; Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U. S. 767, 773, 91 L. Ed. 1234, 67 S. Ct. 1026 (1947).

In all of these situations state law will be relegated to subordinate status. Furthermore, as in de la Cuesta, these principles are applicable to real property law because: "The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S. 663, 666, 8 L. Ed. 2d 180, 82 S. Ct. 1089 (1962); see also Ridgway v. Ridgway, 454 U.S. 46, 54-55, 70 L. Ed. 2d 39,

102 S. Ct. 49 (1981).

Second, Section 341(b)(2) of the Garn Act provides in pertinent part that, "exercise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract. This provision should not be interpreted to mean that this incorporates state contract law and therefore incorporates any state law restricting the exercise of a due-on-sale clause. The incorporation of state law does not signify the inapplicability of federal law because "a fundamental principle in our system of complex national policy" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution." Havenstein v. Lynham, 100 U.S. 483, 490, 25 L. Ed. 628 (1879); see also Testa v. Katt, 330 U.S. 386, 390-392, 91 L. Ed. 967, 67 S. Ct. 810, 172 A.L.R. 225 (1947). Furthermore, this subsection of the Garn Act, like that examined by the Court in de la Cuesta, simply makes it clear that the regulation does not empower lenders to accelerate a loan upon transfer of the security property unless the parties to the contract have so provided. Fidelity Federal Savings and Loan Association v. de la Cuesta, supra.

The instant case does not present the problem presented to the Court in de la Cuesta where the Federal Home Loan Bank Board had issued regulations authorizing due-on-sale clauses in the loan contracts of federal savings and loan associations; however, it is important to note that the Court concluded that Congress had delegated to the Board broad authority to establish and regulate "a uniform system of [savings and loan] institutions where there are not any now," and to establish them with the force of the government behind them, with a national charter", House Hearings 15 (April 21, 1933) (Statement of Chairman Stevenson); Id. at 17 (April 20, 1933); de la Cuesta, supra. Therefore, the Court found no difficulty in concluding that the due-on-sale regulation was within the scope of the Board's authority under the Homeowners Loan Act and consistent with the Act's principal purposes. Id. at 684.

C O N C L U S I O N

Based upon the foregoing, it is respectfully submitted that the First District Court of Appeal's decision should be reversed. Florida is not a "window period" state, and therefore, the contract clause must be held to be an enforceable due-on-sale provision in light of the Congressional Mandate as set forth in the Garn St. Germain Depository Institutions Act. Additionally, the due-on-sale provision must be enforced without a showing of impairment of security as a bargained for provision within the mortgage contract.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the ORIGINAL AND SEVEN COPIES of the foregoing Initial Brief of Petitioners were furnished by first class United States Mail to The Honorable Sid J. White, Clerk of The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; I FURTHER CERTIFY that a true copy of the foregoing Initial Brief of Petitioners was furnished by first class United States mail to H. Reynolds Sampson, Attorney for Respondents, Post Office Box 3457, Tallahassee, Florida, 32315, on this 26 day of June, A.D., 1984.

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