IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PIONEER FEDERAL SAVINGS
and LOAN ASSOCIATION,

Plaintiff, Petitioner,

v.

ROBERT H. REEDER, MARY L.
REEDER, and CORINTHIAN
INVESTMENTS, INC.,

Defendants, Respondents.
_____/

CASE NO. 65,660

SECOND DISTRICT COURT OF
APPEAL NO. 83-1771

ANSWER BRIEF OF RESPONDENTS

APPEAL FROM THE SECOND
DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

Pages

TABLE OF CITATIONS

PAGES

PAGES

OTHERS

PAGES

INTRODUCTION

Respondents adopt the designation of the parties utilized by petitioner in its brief. Accordingly, petitioner, Pioneer Federal Savings and Loan Association, who was the appellant in the Second District Court of Appeal and the plaintiff in the trial court, will be referred to as "plaintiff." Respondents, Robert H. Reeder, Mary L. Reeder and Corinthian Investments, Inc., who were the appellees in the Second District Court of Appeal and the defendants in the trial court, will be referred to as "defendants."

References to the record on appeal will be designated by "R" followed by the page number; references to petitioner's appendix will be designated by "A" followed by the page number; references to petitioner's initial brief will be designated by "B" followed by the page number.

STATEMENT OF THE CASE AND OF THE FACTS

Defendants accept plaintiff's statement of the case and statement of the facts. The only facts pertinent to this appeal, however, are the following dates:

August 2, 1973	Date of Reeder mortgage to Pioneer.
August 30, 1979	Date of Reeder transfer to Corinthian.
June 8, 1976	Effective date of federal regulation authorizing enforcement of due-on-sale clauses.
October 15, 1982	Effective date of Garn-St. Germain Act.

JURISDICTIONAL STATEMENT

The Second District Court of Appeal certified the following question to this court as one of great public importance:

> IS THE GARN-ST. GERMAIN ACT RETROACTIVE IN APPLICATION AS IT PERTAINS TO TRANSFERS MADE PRIOR TO THE EFFECTIVE DATE OF THE ACT?

Part I of plaintiff's initial brief addresses that issue. B at 8-19. Part II of plaintiff's initial brief, on the other hand, addresses the impact of federal regulations existing prior to Garn-St. Germain. B at 20-33. Those issues clearly are outside the scope of the question certified to the Court by the Second District Court of Appeal. Defendants

therefore object to consideration of plaintiff's argument on those points. Defendants will, however, respond to those arguments in Part II of this brief.

SUMMARY OF ARGUMENT

All statutes are presumed to operate prospectively only, and this presumption is overcome only when the terms of the statute clearly require retroactive application. The terms of the Garn-St. Germain Act not only fail clearly to require retroactive application, but in fact demonstrate that the statute was not intended to apply retroactively to transfers made prior to the effective date of the Act.

Furthermore, statutory construction in favor of prospective application is required when retroactive application of the statute is constitutionally impermissible. In this case, retroactive application of the Garn-St. Germain Act to transfers made prior to its effective date would constitute an impairment of the obligations of contract in violation of the due process clause of the Fifth Amendment to the United States Constitution.

Finally, with regard to the federal regulations preceding the Garn-St. Germain Act, it is clear that the mortgage in this case pre-dated any federally created authority to enforce due-on-sale clauses and that, as with Garn-St. Germain, retroactive application of such regulations is constitutionally prohibited.

ARGUMENT

I. THE GARN-ST. GERMAIN ACT CANNOT BE APPLIED RETROACTIVELY TO TRANSFERS MADE PRIOR TO THE EFFECTIVE DATE OF THE ACT

Plaintiff advances two arguments in favor of retroactive application of the Garn-St. Germain Act. First, plaintiff contends that the Act on its face "unequivocally requires" retroactive application. B at 10, 11-15. Secondly, plaintiff alternately contends that even if retroactive application is not clearly required on the face of the Act, the Act nevertheless should be applied retroactively because it is remedial only and affects no substantive rights. B at 10, 16-19. Neither of plaintiff's contentions is

correct.

Before turning to the direct, analytical interpretation of the Act and the constitutional ramifications of retroactive application, it is helpful to establish the present status of the judicial decisions on the issue presented to this Court. The lower Florida appellate courts and courts from other jurisdictions already have addressed this issue on several occasions, and defendants have located no reported decision supporting the retroactive application of either the Garn-St. Germain Act or the federal regulations.

In four separate cases the Florida courts have refused to apply the federal regulations retroactively and have held that prior to June 8, 1976, the effective date of 12 C.F.R. §545.8-3(f) (1982), federal law did not preempt applicable state law concerning the enforcement of due-on-sale clauses in federal savings and loan association mortgages. Pioneer Federal Savings and Loan Association v. Reeder, 9 Fla.L.W. 1533 (2d DCA, No. 83-1771, July 11, 1984); Kiefer v. Fortune Federal Savings and Loan, 9 Fla.L.W. 1440 (2d DCA, No. 83-1740, June 27, 1984); Weiman v. Mchaffie, 9 Fla.L.W. 782 (1st DCA, No. AT-476, April 6, 1984); First Federal Savings and Loan Association v. Quigley, 445 So.2d 1052 (Fla. 2d DCA 1984).

Similarly, the Florida appellate courts on three occasions have rejected the retroactive application of the Garn-St. Germain Act. Pioneer Federal Savings and Loan Association v. Reeder, supra; Kiefer v. Fortune Federal Savings and Loan Association, supra; Freedom Savings and Loan Association v. LaMonte, 9 Fla.L.W. 788 (2d DCA, No. 83-1804, April 4, 1984).

Two other state supreme courts have addressed the issue of retroactive application of the federal regulations allowing enforcement of due-on-sale clauses, and in both cases the courts rejected any application prior to the effective date of the 1976 regulation. See Abrego v. United Peoples Federal Savings and Loan Association, 644 S.W.2d 858 (Ark.1984) and Scappaticci v. Southwest Savings and Loan Association, 662 P.2d 131

(Ariz.1983). Accordingly, as far as defendants have determined, this matter comes before the Court with no other court having allowed retroactive application of either the regulations or the Garn-St. Germain Act. As the following discussion demonstrates, those decisions are correct in both respects.

A. The Plain Meaning of the Act Does Not Require Retroactive Application.

Plaintiff advances three statutory construction arguments to support its contention that the Garn-St. Germain Act, 12 U.S.C. §1701j-3 (1982), facially requires retroactive application to transfers made prior to its October 15, 1982, effective date. None of those arguments is sound.

Plaintiff's first contention is that §1701j-3(b)(1) of the Act provides that a "lender may . . . enter into or enforce a contract containing a due-on-sale clause . . . ." (emphasis added). B at 11. Plaintiff argues that the insertion of the term "or enforce" suggests applicability to a pre-existing contract. Plaintiff's conjecture is erroneous for three reasons.

First, plaintiff itself acknowledges that the general rule of statutory construction presumes that statutes operate prospectively only, and that the presumption cannot be rebutted without demonstrating that the terms of the statute clearly require retroactive application. B at 11. If Congress intended for the Act to apply retroactively, it could and would have rebutted the presumption by stating expressly that the Act was to apply to prior transfers; it would not have relied upon some nebulous and speculative construction of the Act based upon the interpretation of the term "or enforce."

The second flaw in plaintiff's analysis is that the insertion of the term "or enforce" does not necessarily imply plaintiff's desired intent. To the contrary, insertion of the term was necessary if Congress wished even prospectively to alter existing state law, under which federal savings and loans always had authority to enter into agreements with due-on-sale clauses but could not enforce them in equity through foreclosure. Consequently, Congress may have inserted the term "or enforce" simply to make it clear

that in the future such institutions not only could include the clauses but also could enforce them.

The third, most fatal defect in plaintiff's reasoning is that, even in plaintiff's view, the insertion of the term "or enforce" suggests applicability only to an existing contract. Plaintiff overlooks the more specific issue certified to this Court--whether the Act applies retroactively to transfers made prior to the Act. Obviously, under plaintiff's proposed construction the Act may apply to existing contracts and still be limited to transfers under those contracts made after and not before the date of the Act.

Plaintiff's second contention is that the insertion of the "window period" exception evidences an intent in favor of retroactive application of the Act. Plaintiff's analysis on this point is internally inconsistent. First, plaintiff concedes that the window period exception was established to "avoid an unfair impact on those real property buyers who entered into their contracts relying on then-existing state restrictions on the enforcement of due-on-sale clauses." B at 12. If that is true, plaintiff fails to explain why it is unfair to apply the Act even prospectively in such circumstances but presumably fair to apply the Act retroactively as plaintiff desires. If prospective application is unfair for prospective transfers made within three years after the date of the Act, on the theory that the parties relied upon state due-on-sale law when they executed their contracts, then certainly those parties who not only executed their contracts but also made a transfer prior to the Act, rather than after the Act, were entitled to rely upon existing state law.

Defendants submit the following as a more reasonable, logical interpretation of the window period exception within the Act. When Congress addressed the issue, which had arisen largely in connection with federal savings and loans, it elected to go beyond that particular lender type and address the enforcement of due-on-sale clauses generally. Congress therefore made the Act applicable to all lenders, but did not intend, and the Act does not provide, that it should apply to any transfer made prior to the Act,

regardless of the identity of the lender. Favoring federal savings and loan associations, however, Congress elected to allow federal associations immediately to enforce due-on-sale clauses with respect to new transfers, while continuing to restrict enforcement by other persons or institutions where state law previously had restricted such enforcement. The restriction, however, was limited to three years, which could be further reduced or eliminated by state legislative action. 12 U.S.C. §1701j-3(c)(1)(A) (1982). Having delegated such authority to the state legislatures, though, Congress was concerned that when eliminating the window period exception the states could give non-federal institutions an advantage over federal institutions, if the state legislature allowed retroactive application to transfers made prior to the Act. Hence the reason for the insertion of §1701j-3(c)(2)(B). Consequently, the purpose of this provision was not the convoluted one now advanced by plaintiff--to "suggest" or "imply" that federal associations could reach prior transfers--but instead simply to insure that the state legislatures could not overstep their bounds and allow retroactive application of the Act, regardless of the identity of the lender. Once again, if Congress had intended to allow retroactive application by federal savings and loan associations, it simply would have so stated and would not have left the matter dependent upon the convoluted reasoning advanced by plaintiff. Congress simply was echoing its original intent, with regard to all lenders, when it stated:

> "A lender may not exercise its option pursuant to a due-on-sale clause in the case of a transfer of a real property loan which is subject to this subsection where the transfer occurred prior to the date of enactment of this Act."

Garn-St. Germain Act, supra, at §1701j-3(c)(2)(B).

Plaintiff's third and final statutory construction argument warrants only brief discussion. Here plaintiff contends that the exemption of nine specific transactions from the Act indicates that Congress intended otherwise to apply the Act retroactively. Plaintiff apparently does not consider the other, equally plausible explanation that, as a matter of policy, Congress elected to eliminate those transactions even from the

prospective application of the Act. Indeed, that is the clear effect of §1701j-3(d). Plaintiff's effort to read more into that election is not justified by the terms of the Act, and in any event the effort certainly does not meet the strict standard that the presumption of prospective application of the statute can be rebutted only upon a showing that the terms of the statute clearly require retroactive application.

B. Retroactive Application of the Act Would Affect Substantive Rights and is Constitutionally Impermissible.

Impliedly recognizing that its first argument on the plain meaning of the statute might fail, plaintiff next argues for retroactive application of the Act on the theory that it is remedial in nature and impairs no vested rights. B at 16-19. Plaintiff's argument is not correct because retroactive application of the Act would impair the obligation of contracts and would violate the due process clause of the Fifth Amendment to the United States Constitution. Indeed, plaintiff itself acknowledges that retroactive application of a purported remedial statute is not allowable if doing so would impair some vested right or would violate some constitutional guarantee. B at 16.

The United States Constitution provides that "[n]o State shall enter into any . . . Law impairing the Obligation of Contracts . . . ." Art. 1, §10, cl.1, U.S. Const. Similarly, the Constitution of the State of Florida provides that "[n]o . . . law impairing the obligation of contracts shall be passed." Art. 1, §10, Fla. Const. The contract clause, which in each instance protects against impairment of vested contract rights, is drawn into issue upon the retroactive application of a statute or regulation. Because contract rights are property rights, the contract clause has been incorporated by reference and made applicable against the federal government through the due process clause of the Fifth Amendment to the United States Constitution. Hepburn v. Griswold, 75 U.S. 603 (1899); Larionoff v. United States, 533 F.2d 1167 (D.C.Cir. 1976), affirmed 431 U.S. 864 (1977); John McShain, Inc. v. District of Columbia, 205 F.2d 882 (D.C.Cir.) cert. denied 346 U.S. 900 (1953); Rivera v. Patino, 524 F.Supp. 136 (N.D. Cal. (1981); In Re Glynn, 13 B.R. 647 (1981); Kerner v. Johnson, 583 P.2d 360 (Id.1978).

Accordingly, the contract clause cases generated by the United States Supreme Court apply directly to the issue of retroactive application of the Garn-St. Germain Act. See, e.g., Energy Reserves Group, Inc. v. The Kansas Power and Light Company, 51 U.S.L.W. 4106 (No. 81-1370, January 24, 1983); Allied Structural Steel Company v. Spannaus, 438 U.S. 234 (1978); United States Trust Company v. New Jersey, 431 U.S. 1 (1977); El Paso v. Simmons, 379 U.S. 497 (1965). As these cases amply demonstrate, the archaic distinction between remedial and substantive rights and obligations, which distinction is drawn by plaintiff in its brief, has been rendered obsolete and discarded in contract clause analysis.

It is established that an impairment of contract may occur either if a right based upon the covenant is destroyed or if a remedy is modified or altered to such an extent that the underlying right is meaningless for practical purposes. Fidelity Union Trust Company v. New Jersey Highway Authority, 395 A.2d 1280 (N.J.App.1978). "Obligation of contract" repeatedly has been held to embrace remedy, including the means allowed by law at the creation of the contract to enforce performance or to redress injury. E.g., State ex rel Porterie v. Walmsley, 162 So. 826 (La.1935).

Plaintiff's contention that the Garn-St. Germain Act may be applied retroactively, on the theory that it affects remedies only, therefore cannot pass constitutional muster. The constitutional test is whether the Act lessens the value of the contract to the parties; if it does, the constitutional prohibition against laws impairing the oblitgation of contracts is violated. For example, in United States Trust Company v. New Jersey, supra, the United States Supreme Court reviewed the history of contract clause cases, in the context of the remedy versus obligation distinction, and concluded that "[i]mpairment of a remedy was held to be unconstitutional if it effectively reduced the value of substantive contract rights." 431 U.S. at 20n.17.

The court on other occasions has made similar pronouncements:

> "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more

> important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The idea of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.'"

Edwards v. Kearzey, 96 U.S. 793, 794 (1878). Relying upon this principle, the court long has held that an impairment of the obligation of contract is within the prohibition of the constitution if the statute is one which directly affects the means or remedy for enforcing the obligation. See Walker v. Whitehead, 83 U.S. 357 (1873). See also American Finance Corp. v. Small, 250 So.2d 768 (La. 2d Cir.1971) (means of enforcing a contract is an obligation secured by the Constitution; therefore the remedy is inseparable from the contract itself). There can be no serious dispute in the present case but that allowed enforcement of the due-on-sale clause materially and substantially lessens the value of the contract to defendants, given the dramatic difference between the contract interest rate and prevailing market interest rates.

Plaintiff next argues that defendants had no vested rights under the mortgage contract prior to the enactment of the Garn-St. Germain Act. That position overlooks the status of Florida law prior to the enactment of the Act as well as its significance upon the substantive contractual rights and obligations between the parties. At the time the subject mortgage was executed in August 1973, and continually thereafter, Florida law unquestionably prohibited enforcement of the due-on-sale clause without a showing of impairment of security. See Clark v. Lachenmeier, 237 So.2d 583 (Fla. 2d DCA1970); First Federal Savings and Loan Association v. Lockwood, 385 So.2d 156 (Fla. 2d DCA1980) (annotating earlier Florida decisions on the question).

The point overlooked by plaintiff is that, as a matter of law, the doctrine of impairment of security became a part of the mortgage contract in August 1973 to the same extent had it been expressly set forth therein. For example, in Edwards v. Kearzey, supra, the United States Supreme Court said:

> "The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void."

96 U.S. at 794. More recently the court has restated this principle in United States Trust Company v. New Jersey, supra, in which it stated:

> "The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. 'The Court has said that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' . . . This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached."

431 U.S. at 20n.17. The state courts have followed this rule with precision. E.g., Farmers' Life Insurance Company v. Wolters, 10 S.W.2d 698 (Tex.App.1928) (if existing law when the contract is made has the effect to vest rights in the parties to a contract, such rights become inviolable immediately and may not be defeated or impaired by subsequent legislation); Carder Realty Corp. v. State, 23 N.Y.S.2d 395 (1940) ("obligation of contract" means the legal obligation of the parties to adhere to an agreement which at the time of contracting the law recognized and made enforceable).

The case most directly on point is Portland Savings Bank v. Landry, 372 A.2d 573 (Me.1977). There the bank sued to foreclose a mortgage and sought retroactive application of a statute which had shortened the redemption period after the foreclosure judgment from one year under prior law to ninety days. In reviewing the constitutionality of the retroactive application of the statute under the contract clause, the court expressly stated that (1) the law in effect at the time of execution of the contract becomes a part of the contract, (2) where a statute lessens the value of a contract to the parties, the constitutional prohibition against laws impairing the obligations of contract is violated, and (3) the one-year redemption period as embodied in

the law when the mortgage was executed was as much a part of the mortgage as if it had been stated in precise language. Consequently, the court held that the new statute, which clearly provided for new procedures for foreclosure of a real estate mortage by shortening the redemption period, unconstitutionally impaired the obligations of contract.

The instant case is even more compelling, because here the vested right guaranteed by prior law prohibited the lender's ability even to foreclose the mortgage, and not simply the length of time to redeem the property as in Landry. See also Bank of Minden v. Clement, 256 U.S. 126 (1921); Barton v. Conley, 112 A. 670 (Me.1921), affirmed, 260 U.S. 677 (1923); Barnitz v. Beverly, 163 U.S. 118 (1896). The defendants in this case clearly had vested rights in the status of Florida law as of August 1973 when the mortgage was executed. No sound constitutional argument can be made to allow the retroactive application of the Garn-St. Germain Act to a transfer which occurred more than three years prior to the effective date of the Act, pursuant to a mortgage executed more than nine years before its effective date. Consequently, the statute should be construed to apply only to transfers effected after the Act, thereby avoiding the constitutional shortcomings of retroactive application.

II. FEDERAL REGULATIONS DID NOT PREEMPT STATE DUE-ON-SALE LAW UNTIL JUNE 8, 1976, AND THE REGULATION MAY NOT BE APPLIED RETROACTIVELY TO EXISTING MORTGAGES

Plaintiff argued below and in Part II of its brief continues to maintain that federal regulations allow enforcement of the due-on-sale clause in defendants' August 1973 mortgage. Careful review of the regulations demonstrate that it was not until June 8, 1976, the effective date of 12 C.F.R §545.8-3(f) (1982), that enforcement of due-on-sale clauses was specifically authorized notwithstanding state law.

Plaintiff relies primarily upon the 1948 regulation requiring all loan instruments to "provide for full protection to the federal association." B at 20; 12 C.F.R. §545.8-3(a). The court below properly rejected the notion that the vague, general language of that

regulation was sufficient to contradict, preempt and preclude state due-on-sale law. Plaintiff nevertheless suggests that the court's opinion in Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982), requires this Court to find the 1948 regulation preempted state law. Plaintiff does not adequately explain, however, why the United States Supreme Court in de la Cuesta did not itself reach such a conclusion, inasmuch as the opportunity clearly was present. To the contrary, as acknowledged by plaintiff the court in de la Cuesta expressly refused to consider federal exeemption prior to June 8, 1976. B at 22.

Close analysis of the significant footnote 24 in de la Cuesta is instructive. There the court pointed out that prior to 1976 California law, unlike Florida law, permitted unrestricted exercise of due-on-sale clauses upon an outright transfer of the property. It was not until 1978 that California law restricted such exercise, which of course was subsequent to the enactment of the June 8, 1976 regulation. Therefore the court had no difficulty disposing of the retroactivity argument in de la Cuesta, because state law clearly had not created any vested rights prior to June 8, 1976. On the other hand, the Supreme Court in footnote 24 pointed out that the retroactivity argument would have been different had the only transfer been the execution of an installment land contract. In that circumstance, the court noted that California law prior to 1976 held that the execution of an agreement for deed did not activate a due-on-sale clause. See Tucker v. Lassen Savings and Loan Association, 526 P.2d 1169 (Cal.1974). Certainly the Supreme Court would not have noted the distinction had it not deemed it important. Accordingly, it is logical to conclude that the court in de la Cuesta would not have retroactively applied the 1976 regulation when, under Florida law, the exercise of the clause clearly was restricted in all circumstances well before June 8, 1976.

Plaintiff's other contention is that insertion of the term "[a]n association continues to have the power . . ." to include a due-on-sale clause in its mortgage in 1976 somehow retroactively created such power as early as 1948. 12 C.F.R. §545.8-3(f) (1982)

(emphasis added). Plaintiff overlooks the point that simply stating or saying something was so does not in fact mean that the power or authority existed. Moreover, the 1976 regulation simply refers to a continuation of the power to include the clause; when it discusses enforcement of the clause it makes no reference whatever to such authority having previously existed. Id.

Finally, regardless of the interpretion placed upon the federal regulations, it is clear from the analysis in Part I(B) above that any retroactive application of the 1976 regulation is constitutionally impermissible. Plaintiff's argument under Part II of its brief, which is outside the scope of the certified question, therefore fails to add any substantive analysis to the issue.

CONCLUSION

The Garn-St. Germain Act does not clearly state that it applies retroactively to transfers made prior to the Act. To the contrary, a reasonable construction of the Act demonstrates that it was intended to have prospective application only. Moreover, construction should be made in favor of prospective application, and against retroactive application, because retroactive application would impair the obligation of contracts and thereby violate the due process clause. With regard to federal regulations, it is clear that no regulatory authority for enforcement of due-on-sale clauses existed before June 8, 1976, and that any retroactive application of the regulation similarly would violate the constitution. This Court therefore should answer the certified question in the negative and should affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents was furnished to Dennis P. Thompson, Esquire and Gary R. Preston, Esquire of Richards, Nodine, Gilkey, Fite, Meyer & Thompson, P.A., 1253 Park Street, Clearwater, Florida 33516, by U.S. mail, postage prepaid this 18th day of September, 1984.

HELMS, MULLISS & JOHNSTON

By: _____

JOEL R. TEW, ESQUIRE