IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PIONEER FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, Petitioner, vs. ROBERT H. REEDER, MARY L. REEDER, and CORINTHIAN INVESTMENTS, INC., Defendants, Respondents.	CASE NO. 65,660 SECOND DISTRICT COURT OF APPEAL NO. 83-1771

BRIEF OF PETITIONER

APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

DENNIS P. THOMPSON, ESQUIRE
GARY R. PRESTON, ESQUIRE
Richards, Nodine, Gilkey, Fite,
Meyer & Thompson, P.A.
1253 Park Street
Clearwater, Florida 33516
(813) 443-3281
Attorneys for Petitioner

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INTRODUCTION

Plaintiff, Petitioner, Pioneer Federal Savings and Loan Association, was the Appellant in the Second District Court of Appeal and will be referred to herein as "Plaintiff." Defendants, Respondents, Robert H. Reeder, Mary L. Reeder, and Corinthian Investments, Inc., were the Appellees in the Second District Court of Appeal and will be referred to herein as "Defendants" or by their names.

Reference to the Record-on-Appeal will be designated by the use of the symbol "R" followed by the appropriate page number. Matter appearing in the Appendix will be designated by the use of the symbol "A".

STATEMENT OF THE CASE

In Count I of the Complaint, Plaintiff, Pioneer Federal Savings and Loan Association, sued the Defendants, Robert H. Reeder, Mary L. Reeder and Corinthian Investments, Inc., seeking to foreclose a mortgage on real property situated in Pinellas County, Florida. (R 1-11) In Count II of the Complaint, Plaintiff sued Defendants, Robert H. Reeder and Mary L. Reeder, for damages arising out of their breach of the mortgage agreement. (R 1-11) The action precipitating the filing of the Complaint was the conveyance of the subject property by Defendants, Robert H. Reeder and Mary L. Reeder, to Defendant, Corinthian Investments, Inc., by means of an instrument entitled "Agreement For Deed" without Plaintiff's consent. (R 9-11) (A 5-7) By virtue of the conveyance, Plaintiff alleged that it was entitled to declare the mortgage in default, accelerate the outstanding balance due thereunder, and recover damages resulting from such breach of the mortgage agreement. (R 1-3)

In response to the Complaint, Defendants filed a Motion To Dismiss (R 14-16), and a Motion For Attorneys' Fees (R 19-25). Defendants sought to dismiss the Complaint for failure to state a cause of action on the following grounds:

1. The Agreement For Deed did not constitute a "conveyance" of the mortgaged property.

2. Failure to allege that Plaintiff's security had been impaired by the "conveyance."

3. The Complaint demonstrates on its face that Plaintiff waived its right to accelerate the mortgage debt by continuing to accept payments after acquiring knowledge of the Agreement For Deed. (R 14-15)

Defendants further moved to recover their attorneys' fees pursuant to Section 57.105, Florida Statutes. (R 19-25)

Defendants' Motions were heard before Circuit Judge B. J. Driver. At the hearing, Judge Driver followed the holding set forth in Chopan v. Klinkman, 330 So. 2d 154 (Fla. 4th DCA 1976), and granted Defendants' Motion To Dismiss solely on the basis that an agreement for deed did not constitute a sale of the subject property so as to permit acceleration of the debt. (R 26-27) (A 3-4) Judge Driver specifically stated that he would have preferred to follow the contrary holding set forth in the case of First Fed. Sav. & Loan Ass'n of Rapid City v. Kelly, 312 N.W.2d 476 (S.D. 1981). (A 3) He further found that, except for application of the Chopan case, Plaintiff had alleged sufficient grounds in its complaint to permit enforcement of the due-on-sale clause, that is, Plaintiff was not required to allege that its security had been impaired nor had there been sufficient facts shown on the face of the Complaint to constitute a waiver of the right to accelerate. (A 3) Lastly, the trial judge found that the justiciable issues of law raised by the pleadings and motions prohibited an award of attorneys' fees pursuant to Section 57.105, Florida Statutes. (A 3) As a result of the foregoing findings, the trial court dismissed the Complaint with prejudice, and denied the request

for an award of attorneys' fees. (A 3-4)

On August 15, 1983, Plaintiff filed its Notice of Appeal with the Second District Court of Appeal. (R 28) Defendants subsequently filed their Notice of Cross Appeal on August 19, 1983. (R 31) The pertinent issues framed by the briefs filed with the Second District Court of Appeal were as follows:

(a) Whether an agreement for deed constitutes a conveyance under Florida law so as to permit the exercise of a due-on-sale clause contained in a federal savings and loan association mortgage.

(b) Whether federal law has preempted the operation and enforcement of due-on-sale clauses contained in a federal savings and loan association's mortgage instrument.

(c) Whether the Garn-St. Germain Act retroactively preempted state restrictions on the enforcement of a due-on-sale clause contained in a federal savings and loan association's mortgage instrument.

On July 11, 1984, the Second District Court of Appeal issued its opinion wherein it affirmed the order of the trial court dismissing the Complaint and held that although the agreement for deed entered into between the Defendants constituted a conveyance as contemplated by the due-on-sale clause at issue, federal law did not preempt applicable state law prior to June 8, 1976, with respect to the enforcement of due-on-sale clauses, and the Garn-St. Germain Act did not apply retroactively so as to permit acceleration premised upon a con-

veyance prior to the effective date of the Act. (A 1-2) Accordingly, Plaintiff could not foreclose its mortgage without alleging and showing that its security was impaired as a result of the conveyance.

As it did in the case of Kiefer v. Fortune Federal Savings and Loan Association, 9 Fla. L.W. 1440 (2d DCA, No. 83-1740, June 27, 1984), the Court certified the following question 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?

On July 25, 1984, Plaintiff filed its Notice to Invoke Discretionary Jurisdiction with this Court.

STATEMENT OF THE FACTS

Plaintiff is a federal savings and loan association subject to supervision and regulation by the Federal Home Loan Bank Board. (R 1)

On or about August 2, 1973, Defendants, Robert H. Reeder and Mary L. Reeder, executed and delivered to Plaintiff a promissory note in the amount of Five Hundred Twenty Thousand Dollars ($520,000.00). Defendants further executed and delivered to Plaintiff a mortgage of even date to secure payment of their promissory note. (R 1, 4, 5) The mortgage executed by Defendants incorporated all of the provisions, terms, covenants, conditions, obligations, powers and other contents of the "master form of mortgage" previously recorded by Plaintiff. (R 5-7) Paragraph eleven of the master mortgage is commonly referred to as a due-on-sale clause and provides as follows:

> That if conveyance should be made by the Mortgagor of the premises herein described or any part thereof, without the written consent of the Association, then and in that event and at the option of the Association and without notice to the Mortgagor, all sums of money secured hereby shall immediately and concurrently with such conveyance become due and payable and in default whether the same are so due and payable and in default by the specific terms hereof or not. (Emphasis added) (R 7)

Defendants, Robert H. Reeder and Mary L. Reeder, subsequently conveyed the property to Defendant, Corinthian Investments, Inc., on or about August 30, 1979, by means of an instrument entitled "Agreement For Deed." (R 9-11) (A 5-7) Said transaction was made without the written consent of the Plaintiff as

required by paragraph eleven of the mortgage. (R 2)

Under the terms of the Agreement For Deed, Corinthian Investments, Inc., became obligated to pay $920,000 of which $60,000 was to be paid on or before the execution of the instrument and the balance in monthly payments, as follows:

(a) $455,829.04 payable <u>without interest</u> in monthly installments of $4,847.13.

(b) $404,170.96 payable with interest at 12% in monthly installments of $4,404.40. (R 9) (A 5)

Additionally, as a part of the transaction, Defendant, Corinthian Investments, Inc., took possession of the premises and agreed to pay "all taxes, assessments, or other impositions" imposed against the subject property and to maintain insurance on the buildings situated thereon. (A 6) The balance reflected in subparagraph (a) above presumably represents the outstanding amount due to Plaintiff under its promissory note at the time of the sale in that the payments are identical to those contained in said note. (R 4, 9)

As a result of the conveyance of the subject property, Plaintiff declared a default and accelerated the outstanding balance due under its note and mortgage and instituted the present action. (R 2)

I.

WITH RESPECT TO DUE-ON-SALE CLAUSES CONTAINED IN MORTGAGE CONTRACTS OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, THE GARN-ST GERMAIN ACT APPLIES TO TRANSFERS PRIOR TO THE EFFECTIVE DATE OF THE ACT BECAUSE

(a) THE PLAIN MEANING OF THE ACT REQUIRES RETROACTIVE APPLICATION, AND

(b) THE ACT IS REMEDIAL IN NATURE AND, THUS, APPLIES RETROACTIVELY.

The Home Owner's Loan Act of 1933 (HOLA), 12 U.S.C. Section 1461 et seq. (1980), was enacted for the purpose of creating a system of federal savings and loan associations, administered by the Federal Home Loan Bank Board (Board) in order to secure that savings and loans would be "permanent associations to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors." S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933) (remarks of Sen. Bulkley); see also Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014 (1982). (A 17-36) The de la Cuesta Court observed that Congress delegated power to the Board expressly for the purpose of ensuring the financial stability of the federal associations in order to provide financing for the purchase and construction of homes. de la Cuesta, supra at 3029-30. (A 32-33) It has been determined that the due-on-sale clause is a provision that is vitally important in providing financial security to federal associations. See infra at pages 31-32. Due to the importance of the due-on-sale clause in furthering the purposes of the

HOLA--providing funds for home purchase--there has been significant regulatory and statutory action to allow for the enforceability of the due-on-sale clause without regard to state law restrictions.

In 1948, the Federal Home Loan Bank Board promulgated a regulation, 12 C.F.R. Section 545.8-3(a) (see, de la Cuesta, supra, at 3019, n.4 (A 22)), that requires all loan instruments to "provide for full protection to the federal association." The Board subsequently interpreted this regulation as authorizing the exercise of due-on-sale clauses, regardless of contrary state law, because such clauses provide for "full protection" to the lender. Advisory Opinion of the Federal Home Loan Bank Board, Resolution No. 75-647* (Schott Advisory Opinion). (A 37-84) (This regulation was in effect when Plaintiff's mortgage was executed). See generally Part II of this Brief. In response to increasing controversy concerning the authority of federal savings and loan associations to include and exercise due-on-sale clauses, the Board issued a regulation, 12 C.F.R. Section 545.8-3(f), which provided that a federal savings and loan association "continues" to have the power to include a due-on-sale clause in its contracts. In a statement of policy issued in connection with the adoption of this regulation, the Board again stated that it intended federal law to exclusively govern the exercise of due-on-sale clauses in its associations'

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*Cited also in de la Cuesta, supra at 3019. (A 22)

mortgages. 41 Fed. Reg. 18286-87 (1976). The Board stressed that "federal associations shall not be bound by or subject to any conflicting state law which imposes different...due-on-sale requirements." Id. In interpreting the effect of this regulation, the United States Supreme Court in de la Cuesta, supra, held that the Board's regulation preempted conflicting state restrictions on the enforceability of due-on-sale clauses of federal savings and loan associations, and stated that federal regulations have the same preemptive effect as federal statutes. Finally, in order to provide uniformity among all lenders, Congress enacted the Garn-St. Germain Depository Institution's Act of 1982, Pub. L. No. 97-320, which provides that:

> "Notwithstanding any provision of the constitution or laws (including the 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."

The Garn-St. Germain Depository Institution's Act of 1982, supra, Section 341(b)(1), codified at 12 U.S.C. Section 1701j-3 (1982). (A 8-10)

On the authority of the Garn-St. Germain Act, the Plaintiff is entitled to enforce the due-on-sale clause contained in the subject mortgage on each of the following grounds: (a) the Act is remedial in nature (impairs no vested rights) and, therefore, applies to the subject transaction; and (b) a fair reading of the Act unequivocally requires retroactive application.

(a)

THE PLAIN MEANING OF THE ACT REQUIRES RETROACTIVE APPLICATION.

While a general rule of statutory construction favors a presumption that statutes operate prospectively only, such presumption is rebutted where the terms and operation of the statute clearly require retroactive application by necessary implication. See, e.g., Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599 (Fla. 1977). Although the Garn-St. Germain Act does not expressly provide for retroactive application, an analysis of the Act itself clearly indicates that preemption of state laws and judicial decisions restricting the enforcement of due-on-sale clauses was intended to apply retroactively.

First, Section 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). (A 9) The language, "or enforce," suggests applicability to an already existing contract which contains a due-on-sale clause by providing for enforcement of the clause apart from execution of a new contract. The implication is retroactive application. Had the authors desired only a prospective preemption, the words "enter into and enforce" would have been used.

Second, the operation of the "window period" exception raises several points in support of application to transfers

prior to the effective date of the Act. Congress carved out a window period exception to the blanket federal preemption in order 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. The window period runs from the time the state acted to restrict enforcement of due-on-sale clauses until the effective date of Garn-St. Germain, October 15, 1982. For loans originating during the window period, Garn-St. Germain will not preempt state law restrictions on the enforcement of due-on-sale clauses for a period of three years, until October 15, 1985.

However, Section 1701j-3(c)(1)(A), (A 9), provides that a state, through legislative action, may reduce the three year stay, thereby causing loans entered into during the window period to be subject to Section 1701j-3(b)(1), the blanket federal preemption. In this event, Congress expressly limits the application of Section 1701j-3(b)(1) to window period loans to situations where the transfer of the encumbered property occurs after the effective date of the Act:

> (B) 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. (Emphasis added).

Garn-St. Germain, supra at Section 1701j-3(c)(2)(B). (A 9) The necessary implication of this limitation is that Section 1701j-3(b)(1) otherwise applies to transfers occurring before

the enactment of Garn-St. Germain, that is, to all transfers not included within the window period limitation. If Section 1701j-3(b)(1) did not apply retroactively, there would have been no need to include the proviso of Section 1701j-3(c)(2)(B) set forth above.

The legislative history further reveals the necessity of "limiting" the application of 1701j-3(b)(1) to transfers after the effective date:

> ...lenders who may be authorized to enforce due-on-sale clauses in window period loans by virtue of state legislative action...can only do so with respect to sales and real property transfers which occur after passage of this legislation. (Emphasis added).

S. Rep. No. 536, 97th Cong., 2nd Sess. 24 (1982). (A 15) It is vitally important to note that this limitation only applies to window period loans. Significantly, federal savings and loans are expressly excluded from the window period exception by virtue of Section 1701j-3(c)(2)(C) of the Act, which states as follows:

> (c) This subsection does not apply to a loan which was originated by a Federal savings and loan association or Federal savings bank.

Thus, federal savings and loan associations receive the full impact of 1701j-3(b)(1)--retroactive application to transfers occurring prior to October 15, 1982. Accordingly, the necessary implication of the provisions of the Act requires application to pre-Act transfers with respect to mortgages of federal savings and loan associations.

In holding that the Garn-St. Germain Act does not apply retroactively, the lower court relied on Section 1701j-3(c)(2)(B) as evidence of Congressional intent for prospective application only. Pioneer Federal Sav. & Loan Ass'n v. Reeder, 9 Fla. L.W. 1533 (2d DCA, No. 83-1771, July 11, 1984) (A 2); Kiefer, supra at 1441. Based on the analysis set forth above, the Second District Court of Appeal has misinterpreted the plain meaning of the Act.

A third point in favor of retroactive application of Garn-St. Germain is revealed on the face of the Act. The drafters of the Act sought to specify the circumstances under which enforcement of due-on-sale clauses would be restricted. In addition to the window period exception and the limitation of Section 1701j-3(c)(2)(B) discussed above, the Act sets out nine other transactions upon which a lender may not exercise its option pursuant to a due-on-sale clause. Garn-St. Germain, supra at Section 1701j-3(d). (A 9-10) Had the drafters intended other limitations on the extent of the blanket preemption of Section 1701j-3(b)(1) (such as transfers prior to the effective date of the Act for federal associations), they would have expressly enumerated them.

It is a well-established principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. See, e.g., Thayer v. State, 335 So. 2d 815 (Fla. 1976). "Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as

excluding from its operation all those not expressly mentioned." Id. at 817. The Garn Act expressly stated those instances where the enforcement of due-on-sale clauses would be limited. Following the aforesaid rule of construction, due-on-sale clauses would be freely enforceable in all situations not enumerated, including transfers prior to the Act with respect to federal savings and loan associations.

Based upon the foregoing analysis, the Garn-St. Germain Act by necessary implication applies to transfers occurring prior to the effective date of the Act.

(b)

THE ACT IS REMEDIAL IN NATURE AND THUS APPLIES RETROACTIVELY.

Remedial statutes, which neither create nor take away vested rights, operate to further or confirm rights or remedies already existing and are applied retroactively. See, e.g., City of Lakeland v. Catinella, 129 So. 2d 133 (Fla. 1961); City of North Bay Village v. City of Miami Beach, 365 So. 2d 389 (Fla. 3d DCA 1978). Section 1701j-3(b)(1) of the Garn-St. Germain Act confirms the ability of a lender to enforce an already-existing contract right, the due-on-sale clause, and does not create new or take away vested rights. Accordingly, the Garn-St. Germain Act is a remedial statute and must be given retroactive application.

> [A] remedial statute must be so construed as to make it effect the evident purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty.

73 Am. Jur. 2d, Statutes Section 354 (1974). The purpose of the Garn Act is to provide for the enforcement of due-on-sale clauses without regard to state law so as to ensure that lenders will remain financially able to supply funds for the purchase of realty. See infra at pages 31-32. The reason for the Act certainly extends to past transactions, and in order to effectuate the purpose of this remedial statute, Garn-St. Germain must be applied to transactions occurring prior to its

effective date.

The due-on-sale clause has long been regarded as a valid, binding, contractual provision. See, e.g., Stockman v. Burke, 305 So. 2d 89 (Fla. 2d DCA 1974) (an action at law where equitable defenses were not available). Even those cases which have restricted the enforceability of due-on-sale clauses under certain circumstances did not hold that such clauses were unenforceable. See, e.g., Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d DCA 1970). Clark held that a due-on-sale clause is enforceable subject to certain equitable defenses. Therefore, the Garn Act is merely confirming the ability to enforce a due-on-sale clause. The Act does not create such ability and, thus, is necessarily remedial in nature.

With respect to federal savings and loan associations, further evidence that Garn-St. Germain is remedial is evidenced by a 1948 regulation of the Federal Home Loan Bank Board. See infra at pages 20-34. As fully discussed in Part II of this Brief, the Board has interpreted the 1948 regulation as preempting state law with respect to due-on-sale enforcement. Infra at 30. Accordingly, state restrictions on enforcement have not been available against federal associations since 1948. Thus, the Garn Act effected no change in the law with respect to federal savings and loans. This position is set forth in the Board's implementing regulations and commentary to the Garn-St. Germain Act:

> The Board is also modifying proposed Section 591.3(a) to affirm that a federal association

> continues to have the authority to include a due-on-sale clause in any real property loan originated by it. Under the proposal, the language could have been read to create only a prospective right. This clarification affirms the Board's longstanding preemption policy in this area, beginning with its interpretation of a 1948 regulation requiring federal associations to include in their loan contracts provisions for "full protection to" the federal association.

48 Fed. Reg. 21554, 21557 (1983). Additional evidence suggesting that Garn-St. Germain effects no change in the law is revealed by Section 341(d) of the Act. (A 9-10) This section prohibits the enforceability of due-on-sale clauses after certain enumerated transfers. Many of these restrictions were previously imposed upon federal savings and loan associations by reason of 12 C.F.R. Section 545.8-3(g) (1976). Thus, Garn-St. Germain neither creates any new rights nor takes away any vested rights and must be accorded retroactive application.

With respect to all lenders, the Garn Act merely removes the possibility of asserting equitable defenses in a foreclosure action. Such equitable defenses are not "vested" in the constitutional sense so as to prevent the Garn Act from applying retroactively. "A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws." 16A Am. Jur. 2d, Constitutional Law Section 669 (1979). Moreover, remedial statutes may change the remedies for enforcement of a contract existing at the time of execution so long as some

remedies remain. See, e.g., Springer v. Colburn, 162 So. 2d 513 (Fla. 1964); City of Memphis v. United States, 97 U.S. 293 (1877). As noted above, Section 1701j-3(d) of the Garn Act enumerates certain restrictions on the enforcement of due-on-sale clauses. Supra at 14. The effect of this legislation is to remove certain state equitable defenses and substitute certain federal statutory exemptions in their place. Therefore, limitations on the enforcement of due-on-sale clauses survive the Act, and the propriety of retroactive applicaton is further enhanced.

Many courts have held that a party has no vested rights in the defense of usury and that the repeal of usury laws operates retroactively so as to eliminate the defense in actions on contracts already made. See, e.g., Ewell v. Saggs, 108 U.S. 143 (1883). The defense of usury is a privilege that belongs to the remedy and forms no element of the rights that inhere in the contract. Id. at 151. Similarly, the equitable defense requiring a lender to show impairment of security before enforcement of a due-on-sale clause is a privilege belonging to the remedy and is not a substantive contract right.

In summary, the Garn-St. Germain Act merely confirms the ability to enforce a due-on-sale clause in a previously existing contract. The Act impairs no vested rights. Accordingly, the Garn Act is remedial in nature and applies to transfers occurring prior to its effective date.

II.

PURSUANT TO THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, THE DUE-ON-SALE CLAUSE IN PLAINTIFF'S MORTGAGE IS ENFORCEABLE BECAUSE

(a) DE LA CUESTA DID NOT ADDRESS THE QUESTION AS TO WHETHER STATE LAW APPLIES TO PRE-1976 MORTGAGE TRANSACTIONS,

(b) REGULATIONS OF THE FEDERAL HOME LOAN BANK BOARD PREEMPT CONFLICTING STATE LAW, AND

(c) STATE DUE-ON-SALE RESTRICTIONS CONFLICT WITH THE 1948 FEDERAL HOME BANK BOARD REGULATION REQUIRING LOAN INSTRUMENTS TO PROVIDE FOR FULL PROTECTION TO THE FEDERAL ASSOCIATION.

At issue in this case is the preemptive effect of a regulation promulgated in 1948 by the Federal Home Loan Bank Board (Board) requiring all loan instruments to "provide for full protection to the federal association." 12 C.F.R., Section 545.8-3(a). Specifically, the questions presented are whether the regulation encompasses the inclusion and enforcement of due-on-sale clauses, and, if so, whether the regulation preempts state restrictions on the enforcement of due-on-sale clauses contained in the loan documents of federally chartered savings and loan associations. These questions were raised below, and the Second District Court of Appeal held that prior to June 8, 1976, 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 Sav. & Loan Ass'n v. Reeder, 9 Fla. L.W. 1533 (2d DCA, NO. 83-1771, July 11, 1984). (A 1-2)

The United States Supreme Court recently had occasion to rule on a remarkably similar issue. See Fidelity Federal Sav. & Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014 (1982). (A 17-36) As will be more fully developed below, the de la Cuesta Court held that the Federal Home Loan Bank Board, upon the authority given it by Congress, issued a regulation in 1976 which indeed preempted conflicting state restrictions on due on sale practices of federal associations. Id. at 3031. (A 34) The identity of issues between this case and de la Cuesta requires that this case be resolved in conformity with the reasoning and analysis of the United States Supreme Court in de la Cuesta.

(a)

DE LA CUESTA DID NOT ADDRESS THE QUESTION AS TO WHETHER STATE LAW APPLIES TO PRE-1976 MORTGAGE TRANSACTIONS.

The proposition that the 1948 regulation preempted state due-on-sale restrictions was brought to the attention of the Supreme Court in de la Cuesta, where two of the deeds of trust subject to the suit were executed prior to July 31, 1976, the effective date of 12 C.F.R. Section 545.8-3(f). de la Cuesta, supra at 3019, 3031 (A 22, 34). The appellants in that case argued that the 1976 regulation was a codification of pre-existing law. Id. The argument was not rejected; rather, the Court declined to rule on it.

In footnote 24 of the de la Cuesta opinion, the Supreme Court noted that under California law prior to 1976, the savings and loan association had the right to enforce the due-on-sale clauses. Thus, because the due-on-sale clauses in the pre-1976 deeds were enforceable, the Supreme Court had no occasion, or need, to rule on the association's contention that the 1976 regulation was a codification of pre-existing law in order to uphold the savings and loan association's position. By refusing to rule on the nature and effect of federal law prior to 1976, the Supreme Court was relying on the well-established "Ashwander Rules." In Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), the Supreme Court set forth a number of discretionary rules by which the Court should abide. The de la Cuesta Court appeared to be following two of

those rules, namely, (1) the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it; and (2) the Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be decided. Thus, the de la Cuesta Court ruled on the pre-1976 transactions based on state law and did not consider the constitutional issue of federal preemption prior to 1976. If pre-1976 California law had been other than as stated by the Supreme Court (e.g., Wellenkamp v. Bank of America, 21 Cal. 3d 143, 582 P. 2d 970, 148 Cal. Rptr. 379 (Cal. 1978)), there is no doubt that the Court would have had to decide whether the Board had preempted the due-on-sale area since 1948 by virtue of Section 545.8-3(a). Therefore, de la Cuesta simply did not address the issue as to whether state law applies to mortgages executed prior to July 31, 1976.

In the present case, the lower court dismissed the 1948 regulation argument without reason or analysis. Reeder, supra at 1534 (A 2). The Second District Court of Appeal based its holding on Kiefer v. Fortune Federal Sav. & Loan Ass'n, supra, in which the 1948 regulation was not disccused. Id. However, in another case, the Second District did recognize that de la Cuesta refrained from ruling on the issue of pre-1976 preemption. First Federal Sav. & Loan Ass'n v. Quigley, 445 So. 2d 1052, 1053 (Fla. 2d DCA 1984).

Other cases which have considered the effect of the 1948 regulation are not persuasive. In Orange Federal Sav. & Loan Ass'n v. Sykes, 433 So. 2d 642 (Fla. 5th DCA 1983), the issue of pre-1976 preemption was an afterthought which was raised in rehearing upon the discovery that the effective date of the 1976 regulation was mistakenly reported in the de la Cuesta slip opinion. Orange, supra at 642-43. The opinion reflects limited briefing on the issue as the Court's ruling is based solely on the language of footnote 24 of de la Cuesta. Id. at 643. In both Abrego v. United Peoples Federal Sav. & Loan Ass'n, 644 S.W. 2d 858 (Ark. 1984), and Scappaticci v. Southwest Sav. & Loan Ass'n, 662 P. 2d 131 (Ariz. 1983), the courts refrained from finding pre-1976 preemption because the 1948 regulation did not expressly address due-on-sale clauses.

As discussed herein, federal preemption may be inferred from the structure and purpose of the law, and must be found where state law stands as an obstacle to the objectives and purposes of federal law. See infra at page 28. None of the above-cited cases have considered the purpose of the 1948 regulation or even discussed the objectives and purposes of the Home Owners' Loan Act of 1933, which, as shown herein, require preemption of state due-on-sale restrictions.

(b)

REGULATIONS OF THE FEDERAL HOME LOAN BANK BOARD PREEMPT CONFLICTING STATE LAW.

The Federal Home Loan Bank Board is a federal regulatory agency with plenary authority to administer the Home Owners' Loan Act of 1933 (HOLA), 12 U.S.C., Section 1461 et seq. (1980). In Section 5 (a) of HOLA, Congress unequivocally empowered the Board to issue regulations "to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations'..." 12 U.S.C., Section 1464(a)(1) (emphasis added).

The de la Cuesta Court concluded that by this language, Congress expressly intended that the Board's regulation supersede state law. de la Cuesta, supra at 3026 (A 29). Many other courts, including this Court, have upheld the preemptive effect of this broad Congressional mandate. See Washington Fed. Sav. & Loan Ass'n. v. Balaban, 281 So. 2d 15, 17 (Fla. 1973), wherein this Court stated as follows:

> By virtue of Title 12 U.S. Code, Section 1464 et seq., the federal government has preempted the regulation and supervision of federal savings and loan associations and the organization, incorporation, examination and operation of the same....

Federal regulations have no less preemptive effect than federal statutes. de la Cuesta, supra at 3022 (A 25). Where Congress has intended that an administrator's regulations supersede state law, judicial review of such regulations is limited to determine if the administrator has exceeded his au-

thority. Id., see also United States v. Shimer, 367 U.S. 374 (1961). Thus, the initial question for this Court is whether the Board acted within its authority in promulgating the 1948 regulation.

The de la Cuesta court found that mortgage lending practices are a "critical aspect" of the "operation" of savings and loans and is clearly within the jurisdiction of the Board. de la Cuesta, supra at 3029 (A 32). Accordingly, the Supreme Court held as follows:

> We have no difficulty concluding that the due-on-sale regulation is within the scope of the Board's authority under the HOLA and consistent with the Act's principal purposes.
>
> Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase.

Id. at 3029-30 (A 32-33).

The 1948 regulation covers the same "critical aspect" of operations of federal associations as the 1976 regulation -- mortgage lending practices. In fact, the Supreme Court noted that in accordance with its congressional authority, the Board has issued regulations specifically addressing the terms of loan instruments, one of which is the 1948 regulation at issue herein. Id. at 3029 n. 20 (A 32). Clearly then, the 1948 regulation (requiring federal associations to provide for full protection in all loan documents) was well within the authority of the Board, was consistent with the purposes of the HOLA, and

thus, was preemptive of conflicting state law. The question remaining concerns whether the 1948 regulation was intended to preempt state due-on-sale restrictions.

(c)

STATE DUE-ON-SALE RESTRICTIONS CONFLICT WITH THE 1948 FEDERAL HOME LOAN BANK BOARD REGULATION REQUIRING LOAN INSTRUMENTS TO PROVIDE FOR FULL PROTECTION OF THE FEDERAL ASSOCIATION.

The doctrine of federal preemption is founded on the Supremacy Clause, U.S. Const., Art. VI, cl. 2. It is not necessary that a federal law contain an express declaration of preemption; rather, preemption may be inferred from the structure and purpose of the law. de la Cuesta, supra at 3022. (A 25) See also, Jones v. Rath Packing Co., 430 U.S. 519 (1977). State law is superseded where there is conflict with a federal law, "or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' Hines v. Davidowitz, 302 U.S. 52...(1941)." de la Cuesta, supra at 3022. (A 25)

de la Cuesta established that mortgage lending practices and the terms of loan instruments are critical in effectuating the purpose of the HOLA -- ensuring the financial stability of federal associations. See supra at page 26. The 1948 regulation regarding mortgage lending practices was directly in pursuit of the purpose of the HOLA. On the authority of Jones v. Rath Packing Co., supra, and Hines v. Davidowitz, supra, the 1948 regulation, without the need for express preemption language, supersedes any state law which stands as an obstacle to the accomplishment and execution of the purpose of the regulation. The 1948 regulation requires the inclusion of provi-

sions which will protect the financial condition of the lender. The due-on-sale clause is such a provision. The 1948 regulation was written in broad terms to encompass any and all provisions which would protect the lenders. Clearly, the regulation contemplates clauses such as the due-on-sale provision. Accordingly, any restriction on the enforcement of due-on-sale clauses would be contrary, and stand as an obstacle, to the purpose of Congress as expressed through the 1948 regulation.

Similar to the situation at hand is the case of Franklin Nat. Bank v. New York, 347 U.S. 373 (1954). There, federal law authorized national banks to receive savings deposits. The statute made no reference to the ability of banks to advertise such service. A New York state statute prohibited national banks from using the word "savings" in their advertisements. The United States Supreme Court held that there was a "clear conflict" between the laws and, thus, the New York statute was preempted. Id. at 378. In the present case, a federal law (the Board's 1948 regulation) requires loan documents to provide for full protection to the lender. The regulation does not specifically address due-on-sale clauses. Florida state law, however, restricts the enforcement of due on sale clauses. Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2nd DCA 1970); First Federal Sav. & Loan Ass'n v. Lockwood, 385 So. 2d 156 (Fla. 2nd DCA 1980). As the New York prohibition regarding advertising frustrated the purpose of the federal law (savings deposit services by banks) so does the Florida prohibition re-

garding due-on-sale enforcement frustrate the purpose of the federal regulation (financial security of federal associations). As in Franklin, a "clear conflict" exists here, and preemption is the proper resolution.

Persuasive support for the proposition that the 1948 regulation preempted state limitations on due-on-sale enforceability is evidenced by Board interpretation. A court must accept and give considerable weight to an agency's interpretation of its own regulation. Udall v. Tallman, 380 U.S. 1 (1965). The Board, in formal action, has interpreted the 1948 regulation as authorizing the enforcement of due-on-sale clauses, regardless of contrary state law, because such clauses allow for "full protection" to the lender. Advisory Opinion of the Federal Home Loan Bank Board, Resolution No. 75-647* (Schott Advisory Opinion). (A 37-84) Further evidence of 1948 preemption is revealed in the 1976 regulation which states that a federal association "continues" to have the power to enforce due-on-sale clauses regardless of state law. 12 C.F.R. Section 545.8-3(f). The use of the word "continues" presupposes a prior preemption. Further, in the implementing regulations and commentary to the Garn-St. Germain Act, the Board's interpretation is again clearly set forth:

> The Board is also modifying proposed Section 591.3(a) to affirm that a federal association continues to have

*Cited also in de la Cuesta, supra at 3019. (A 22)

> the authority to include a due-on-sale clause in any real property loan originated by it. Under the proposal, the language could have been read to create only a prospective right. This clarification affirms the Board's longstanding preemption policy in this area, beginning with its interpretation of a 1948 regulation requiring federal associations to include in their loan contracts provisions for "full protection to" the federal association.

From the language of the regulation, and the overall policy of the HOLA (see supra at pages 25-26), the clear intent of the 1948 regulation was to require that federal associations include and enforce provisions of their loan contracts which would protect the financial stability of the association. de la Cuesta established that regulations concerning mortgage lending practices (specifically due-on-sale clauses) are within the authority of the Board and given preemptive effect. The regulation was written in general terms to include all methods and provisions which would preserve the financial integrity of the federal lenders. Although the regulation did not expressly address the due-on-sale clause, it certainly anticipated it, as such clauses do indeed protect the federal associations. It would be short-sighted to think that the Board should have enunciated each and every means by which it intended a federal association to protect itself through its loan instruments.

Restrictions on the ability of federal associations to enforce due-on-sale clauses in their mortgage contracts endanger the financial condition of the associations and jeopardize the very purpose of the HOLA--to make funds available for the con-

struction and purchase of homes. See de la Cuesta, supra at 3019, 3030. (A 22, 33) The following excerpt from the Senate Banking Committee Report on the Garn-St. Germain Act further reveals this serious concern:

> Thus, restrictions on due on sale clauses generally help existing home buyers to the disadvantage of new home buyers. 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.

S. Rep. No. 536, 97th Cong., 2nd Sess. 21 (1982). (A 12) Public interest in the availability of funds for the purchase of homes overwhelmingly outweighs the concerns of those homeowners who experience difficulty in selling their homes subject to mortgages. As a result, the Garn-St. German Act was enacted.

Thus, due-on-sale restrictions have clearly been shown to impede the purpose of the HOLA--financial stability of Federal savings and loans. The de la Cuesta Court noted the import of the HOLA as follows:

> The Act provided for the creation of a system of federal savings and loan associations, which would be regulated by the Board so as to ensure their vitality as "permanent associations to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors." S. Rep. No. 91, 73d Cong., 1st Sess. 2 (1933)...(remarks of Sen. Bulkley).

de la Cuesta, supra at 3026. (A 29) The 1948 regulation is a direct extension of the HOLA which furthers the financial security of federal associations by requiring their loan instru-

ments to include provisions which provide for full protection to the association. As previously stated, the due-on-sale clause is a vitally important provision for protecting lenders. Thus, state due-on-sale restrictions are in direct conflict with the 1948 regulation and stand as a serious obstacle to the objectives and purposes of the HOLA. "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." de la Cuesta, supra at 3022 (A 25); Free v. Bland, 369 U.S. 663, 666 (1962). Accordingly, federal preemption has occurred, and Plaintiff is entitled to freely enforce its due-on-sale clause as required by the 1948 regulation and in furtherance of the purpose of the Home Owner's Loan Act of 1933.

CONCLUSION

In each of Points I and II, Petitioner, Pioneer Federal Savings and Loan Association, has established adequate grounds for reversal, and for the reasons stated therein, the decision of the Second District Court of Appeal should be vacated with directions to enter an order reversing the trial court's order dismissing the Petitioner's complaint.

DENNIS P. THOMPSON and

GARY R. PRESTON for
Richards, Nodine, Gilkey, Fite,
Meyer & Thompson, P.A
1253 Park Street
Clearwater, Florida 33516
Attorneys for Petitioner
Pioneer Federal Savings and
Loan Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner and Appendix to Brief of Petitioner has been furnished by regular U.S. mail to Joel R. Tew, Esquire, P. O. Box 1842, Tampa, Florida 33601, this 20th day of August, 1984.

GARY R. PRESTON for
RICHARDS, NODINE, GILKEY, FITE,
MEYER & THOMPSON, P.A.
1253 Park Street
Clearwater, Florida 33516
813/443-3281
Attorneys for Petitioner