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

REPLY BRIEF OF PETITIONER

APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

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JURISDICTIONAL STATEMENT

Part II of Plaintiff's initial Brief discusses the preemptive effect of a 1948 Federal regulation with respect to state restrictions on the enforcement of due-on-sale clauses. (Brief of Petitioner at Pages 20-34). Part II of Defendants' Answer Brief responds to this argument. (Answer Brief of Respondent at 11-13). This issue was thoroughly briefed below by both parties, and the Second District Court of Appeal ruled adversely to the Plaintiff's position.

Defendants argue that the issues raised in Part II of the Plaintiff's Brief are outside the scope of the question certified by the Second District Court of Appeal and object to the consideration of those points by this Court. Defendants cite no cases in support of their objection. In fact, numerous rulings by this Court reveal that Defendants' objection is completely without merit.

A case often cited for the proposition that the Supreme Court has jurisdiction to review the entire decision of a District Court of Appeal and not just the question certified is Zirin v. Charles Pfizer and Co., 128 So. 2d 594 (Fla. 1961). As in this case, Zirin involved a question certified to be of great public interest (today called great public importance, Fla. Const. Art. V, Section 3(b)(4)). The following excerpt from the Zirin case explains the reasons why this Court should dispose of the entire cause when the issues are properly before it:

> It is not the question of great public interest in a decision that we are concerned with but the decision that passes upon such a question. Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without "sale, denial or delay." Peacemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here..."[m]oreover, the efficient and speedy administration of justice is...promoted" by doing so.

Zirin. 128 So. 2d 596.

In another case, Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982), this Court held that the "authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." The Savoie Court then reviewed the policy reasoning of the Zirin case quoted above. The Court concluded that based upon these policies and the fact that the parties had fully briefed and argued the issue, the Court could properly consider the issue and should do so in order to avoid a peacemeal determination of the case.

Other cases which have held that the review power of the Supreme Court is not limted to the certified question are: Bell v. State, 394 So. 2d 979 (Fla. 1981); State v. Tait, 387 So. 2d 338 (Fla. 1980); Pan American Bank of Miami v. Alliegro, 149 So. 2d 45 (Fla. 1963).

Plaintiff submits that the issue of the preemptive effect of the 1948 regulation has been properly briefed by both par-

ties and is dispositive of the case. It is appropriate for this Court to address this issue to avoid a peacemeal determination of Plaintiff's cause. As shown hereafter, the narrow question certified by the Second District Court of Appeal is so intertwined with the other issues considered below that its determination will necessarily involve a resolution of all issues.

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.

By taking the position that the words "or enforce" as contained in 12 U.S.C. Section 1701j-3(b)(1) merely authorize the enforcement of a due-on-sale clause in a federal savings and loan's mortgage contract entered after the effective date of the Garn-St. Germain Act and only in the case of transfers occuring subsequent to the date of the Act, the Defendants have ignored well-settled rules of statutory construction. Florida courts have consistently adhered to the principle that "legislative intent is the pole star by which we must be guided in interpreting the provisions of a law." Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1982). In determining legislative intent, some of the more useful tools a court should resort to are the legislative history, the purpose of the enactment, and the state of the law on the same subject at the time of enactment. DeBolt v. Dept. of Health and Rehab. Services, 427 So.2d 221 (Fla. 1st D.C.A. 1983). United States v. Anaya, 509 F. Supp. 289, 297 (S.D. Fla. 1980), affirmed 685 F.2d 1272. Furthermore, a legislative body is presumed to be specifically aware of judicial construction and interpretation in an area of the law at the time it enacts a particular law. Gulfstream

Park Rac. Ass'n. v. Div. of Bus. Reg., 441 So. 2d 627 (Fla. 1983). By applying these principles of statutory construction, it is clear that Congress intended the words "or enforce" in Sec. 1701j-3(b)(1) of the Act to apply both to existing federal savings and loan mortgage contracts and to transfers of the encumbered properties occuring prior to the effective date of the Act.

At the time the Garn-St. Germain Act was passed, a federal savings and loan association had the power to enforce a due-on-sale clause without state restriction. Fidelity Federal Sav. and Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014 (1982). (A 17-36) Defendants would have this Court believe that Congress somehow intended to take away this power already vested in federal savings and loans when it passed the Garn-St. Germain Act. Rather, Congress intended to preempt this area of the law in order to eventually have all lenders on a competitive basis with federal thrift institutions:

> The pre-emption of state due-on-sale restrictions will place all lenders on a more competitive footing, and eliminate the confusion surrounding enforceability of due-on-sale.

S. Rep. No. 536, 97th Cong., 2nd Sess. 21 (1982). (A 12) Further evidence that Congress intended to leave intact the power of federal savings and loans to enforce existing due-on-sale clauses is contained in the following excerpt from the legislative history:

> Hence, the due-on-sale practices for federally chartered thrifts, for loans originated by those thrifts,

> will continue to be subject to the Federal Home Loan Bank Board's exclusive regulatory authority. (Emphasis added).

Id. at 24. (A 15) Thus, the use of the words "or enforce" in Sec. 1701j-3(b)(1) was not, as Defendants suggest, an unconstitutional retroactive impairment of a vested right; rather, it was merely a legislative recognition, reaffirmation and approval of pre-existing law that enabled federally chartered thrifts to enforce their due-on-sale clauses. See also, the commentary and implementing regulations of the Federal Home Loan Bank Board as set forth on pages 17 and 18 of Plaintiff's initial Brief.

In construing the proper interpretation of the word "or" in the phrase "enter into or enforce a contract containing a due-on-sale clause" as contained in Sec. 1701j-3(b)(1), the following explanation is helpful:

> In ascertaining the meaning and effect to be given the word "or" the legislative intent is the determining factor. In its elementary sense, the word "or", as used in a statute, is a disjunctive article indicating an alternative. Employed between two terms that describe subjects of a power, the word "or" usually implies a discretion when it occurs in a directory provision, and a choice between two alternatives when it occurs in a permissive provision.

30 Fla. Jur. Statutes Sec. 100 (1974). See also Telephase Soc. of Fla. Inc. v. State Bd. of Fun. D. & E., 334 So. 2d 563 (Fla. 1976). In Sec. 1701j-3(b)(1), the phrase "or enforce" was intended in the disjunctive sense to apply to the existing powers of federal thrift institutions.

In light of the fact that Congress was well-aware of the

existing law on the subject (de la Cuesta) and its obvious intention to continue the power of federal thrifts to enforce due-on-sale clauses, it becomes even more important to note that the only exemptions to the enforcement of a due-on-sale clause in a federal thrift's mortgage contract are contained in Sec. 1701j-3(d) of the Act. It is an established principle of statutory construction that when a legislative body reenacts a statute, it is presumed to know and adopt the construction placed thereon by administrative agencies charged with enforcing the same. State ex rel. Szabo Food Serv., Inc. of N.C. v. Dickinson, 286 So. 2d 529 (Fla. 1974); Peninsular Supply Co. v. C. B. Day Realty, 423 So. 2d 500 (Fla. 3d DCA 1982); Brennan v. General Telephone Company of Florida, 488 F. 2d 157, 160 (5th Cir. 1973). Similarly, at the time of enacting the Garn-St. Germain Act, Congress is presumed to have known and therefore adopted the position of the Federal Home Loan Bank Board with respect to the preemption issue. That position (preemption since the 1948 regulation) is set forth in part II(c) of Plaintiff's initial Brief. Thus, the fact that Congress passed the Garn-St. Germain Act without limitation of a federal thrift's power to "enforce" a due-on-sale clause is evidence that it intended preemption with respect to those institutions since 1948. There is no indication in the Act that Congress intended to vary or change the Federal Home Loan Bank Board's interpretation of existing federal regulations in the due-on-sale area. Any attempt by Defendants to limit a federal thrift's power to

enforce due-on-sale clauses only in post-1976 contracts is unsupported by the plain wording of the Act, the legislative history, the existing law at the time in question, and the intent of Congress.

Defendants have further misconstrued the effect of the "window period" exception and its significance to federal thrift institutions. In simple terms, the "window period" provides protection for three (3) years after the effective date of the Act to borrowers from non-federal institutions in those states that had due-on-sale prohibitions at the time such borrowing took place. 12 U.S.C. Sec. 1701j-3(c)(1). However, Sec. 1701j-3(c)(1)(A) empowers state legislatures to remove that three-year prohibition, provided, however, that in any event, a non-federal lender cannot enforce a due-on-sale clause as a result of a transfer prior to the Act's effective date. See Sec. 1701j-3(c)(2)(B). Unless Sec. 1701j-3(b)(1) itself was intended to apply to existing contracts and transfers prior to the Act, Sec. 1701j-3(c)(2)(B) would be meaningless. Why would Congress expressly prohibit application to transfers prior to the Act in certain cases unless it intended pre-Act application in other cases? Again, federal savings and loans and federal savings banks are expressly exempted from any prohibition on the enforcement of pre-Act due-on-sale violations [Sec. 1701j-3(c)(2)(C)], except in those instances contained in Sec. 1701j-3(d).

(b) THE ACT IS REMEDIAL IN NATURE, IMPAIRS NO VESTED RIGHTS, AND, THUS, APPLIES RETROACTIVELY.

In part I(B) of their Answer Brief, Defendants assert that the application of the Garn-St. Germain Act to their mortgage would impair constitutionally vested rights. However, at the time of the transaction at issue, August 2, 1973, Defendants had no vested rights in the impairment of security defense derived from Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d DCA 1970). As set forth in Part II of Plaintiff's initial Brief, federal regulations have preempted the due-on-sale field since 1948.

This Court has previously recognized that the "operation" of federal savings and loans has been preempted by federal regulation. Washington Fed. Sav. & Loan Ass'n. v. Balaban, 281 So. 2d 15 (Fla. 1973). The Federal Home Loan Bank Board has promulgated comprehensive regulations which govern "the powers and operations of every federal savings and loan associations from its cradle to its corporate grave." California v. Coast Federal Savings and Loan Association, 98 F. Supp. 311, 316 (S.D. Cal. 1951); Meyers v. Beverly Hills Federal Savings and Loan Ass'n., 499 F. 2d 1145, 1147 (9th Cir. 1974); Kupiec v. Republic Federal Savings & Loan Ass'n., 512 F. 2d 147, 150 (7th Cir. 1975). Certainly, federal savings and loans have had the authority to include due-on-sale clauses in their mortgages by virtue of the 1948 FHLBB regulation requiring all loan instruments to provide for full protection to the Association. de la

Cuesta, supra at 3019, n.4 (A 22). Even though this 1948 regulation did not expressly describe a due-on-sale clause, this regulation, together with the overall pervasive regulatory scheme, is sufficient action to preempt the field. As stated by the United States Supreme Court in Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 773-774 (1947):

> ...When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own ....But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency....(Emphasis added.)

Similarly stated, where a Board regulation grants a right or imposes a duty in general terms respecting federal associations, any issue concerning such rights or duties must be resolved exclusively under federal law. Murphy v. Colonial Federal Savings & Loan Ass'n., 388 F. 2d 609, 611 (2d Cir. 1967); Kupiec, supra at 152.

Application of state restrictions to the enforcement of due-on-sale clauses included in mortgages since 1948 would destroy the uniformity and fiscal vitality that Congress intended when it created a federal system of thrift institutions.

> The consistency and universality inherent in applying a single federal standard to the federal savings and loan system, whether it be statutory, regulatory or derived from federal common law, is in keeping with the underlying objective of HOLA, which contemplates a uniform set of policies for federally chartered associations which does not vary with the quirks of local law.

Rettig v. Arlington Hgts. Fed. Sav. & Loan Ass'n., 405 F. Supp. 819, 826 (N.D. Ill. 1975).

In keeping with the aforesaid principles, this Court must address the unanswered question in de la Cuesta and find, consistent with its previous opinion in Washington Federal Savings & Loan Ass'n. v. Balaban, supra, that federal law has preempted the due-on-sale field since 1948. Defendants have no vested rights inconsistent with federal law and policy with respect to the mortgage at issue.

II.

STATE DUE-ON-SALE RESTRICTIONS ARE IN DIRECT CONFLICT WITH, AND STAND AS AN OBSTACLE TO, THE PURPOSES AND OBJECTIVES OF THE 1948 FEDERAL REGULATION AND ARE THEREFORE PREEMPTED.

Plaintiff contends that the 1948 regulation of the Federal Home Loan Bank Board which required all loan instruments to "provide for full protection to the federal association" preempted state due-on-sale restrictions. 12 C.F.R. Section 545.8-3(a). The purpose of this regulation, in furthering the objectives of the Home Owners' Loan Act of 1933 (HOLA), was to insure that federal savings and loan associations would remain financially secure in order to supply financing for home construction and purchase. See de la Cuesta, supra at 3029-30 (A32-33). The de la Cuesta court observed that state law is preempted 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). A due-on-sale clause is a device to protect the financial well-being of a lender and is clearly encompassed by the language of the 1948 regulation. State due-on-sale restrictions endanger the financial soundness of the federal savings and loan associations. S. Rep. No. 536, 97th Cong., 2nd Sess. 21 (1982) (A 12). Therefore, on the authority of de la Cuesta and Hines, state due-on-sale restrictions are preempted by federal law because such restrictions are in direct conflict

with, and stand as an obstacle to the accomplishment of the purposes and objectives of the 1948 federal regulation (12 C.F.R. Section 545.8-3) as well as the HOLA of 1933.

Defendants improperly assert that the lower court rejected this argument because the language of the 1948 regulation was vague and general and not sufficient to prempt state law. As noted in Plaintiff's Brief, the Second District Court of Appeal gave no reason for its ruling on this issue (Brief of Petitioner at 23). As to Defendants' suggestion that the language of the regulation in question is too vague and general, Plaintiff reiterates that 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); Jones v. Rath Packing Co. 430 U.S. 519 (1977). The purpose of the 1948 regulation is to provide financial security to federal savings and loan, and any obstacles to such objective, such as due-on-sale restrictions, are necessarily preempted.

Defendants are correct in observing that footnote 24 in de la Cuesta is significant. However, Defendants have failed to correctly articulate that significance. Defendants suggest that footnote 24 somehow reveals the Court's concern for "vested rights" prior to 1976 and, therefore, it logically follows that had California law restricted due-on-sale enforcement prior to 1976, the de la Cuesta court would not have applied the 1976 regulation retroactively. (Answer Brief of Respon-

dants at 12).

To begin with, neither the Appellant in de la Cuesta, nor the Plaintiff here, suggest that the 1976 regulation (12 C.F.R. Section 545.8-3(f)) be applied retroactively. Rather, the position asserted in de la Cuesta and here, is that the 1948 regulation preempted state due-on-sale restrictions, and thus, the 1976 regulation effected no change in the law. de la Cuesta, supra, footnote 24 at 3031 (A 34).

The de la Cuesta court comments about pre-1976 California law in response to the Appellees' argument that retroactive application of the 1976 regulation would deprive them of "vested rights." Id. Accordingly, the Court notes that the due-on-sale clauses in the deeds of trust were freely enforceable prior to 1976, and pursuant to the Ashwander rules, does not address the issue of vested rights, retroactive application of the 1976 regulation, or the preemptive effect of the 1948 regulation Ibid. See Brief of Petitioner at 22-23.

The significance of footnote 24 is that de la Cuesta did not decide the question of federal preemption prior to 1976. Rather than attempt to draw inferences from this footnote, Plaintiff submits that a reading of the entire de la Cuesta opinion reveals a serious concern that the purposes and objectives of the HOLA be fulfilled, and not hampered, by contrary state law. de la Cuesta, supra (A 17-36). The logical extension of the de la Cuesta reasoning is to find federal preemption of restrictions on due-on-sale enforcement at least since 1948, and perhaps from the inception of the HOLA itself in 1933.

CONCLUSION

An analysis of the legislative history and intent of the Garn-St. Germain Act reveals a Congressional purpose to continue the federal preemption of due-on-sale enforcement with respect to a federal savings and loan association that existed at the time of its enactment. The Act was a reaffirmation of existing authority. The only limitations on a federal savings and loan's enforcement of a due-on-sale clause for pre-Act transfers are those enumerated in Sec. 1701j-3(d). By avoiding any further limitation, Congress intended to adopt the full scope of preemption as consistently advocated by the Federal Home Loan Bank Board, that is, preemption since the 1948 regulation. Since Plaintiff's mortgage was entered subsequent to the 1948 regulation, Defendants have no vested rights that are adversely affected.

The question certified by The Second District Court of Appeal should be answered in the affirmative, and the decision of that Court should be vacated with directions to enter an order reversing the trial Court's order dismissing the Petitioner's Complaint.

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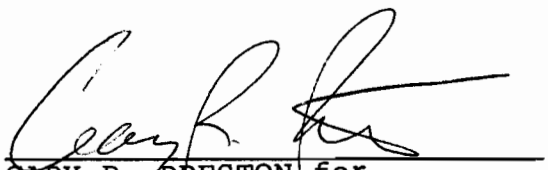
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by regular U.S. mail to Joel R. Tew, Esquire, P. O. Box 1842, Tampa, Florida 33601, this 15th day of October, 1984.



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