

TO: All Assessing Officers
FROM: Emil Tahvonen, Administrator
State Tax Commission

Bulletin No. 3 - January 14, 1983
Federally Chartered Savings and
Loan Associations Foreclosures -
Due-on-sale Clauses

STATE OF MICHIGAN

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MORTGAGES: Due-on-sale clause--foreclosure
of mortgage containing clause
in state courts

SAVINGS AND LOAN
ASSOCIATION: Foreclosure of mortgage containing
due-on-sale clause in state courts

A federally chartered savings and loan association may foreclose
a mortgage containing a due-on-sale clause in the state courts.

Opinion No. 6109

Honorable H. Lynn Jondahl
State Representative
The Capitol
Lansing, Michigan

DEC 10 1982

You have requested my opinion on the following question:

May a federally chartered savings and loan
association foreclose a mortgage under
Chapter 32 of the Michigan Revised Judicature
Act when its sole ground for foreclosure is
a "due-on-sale" clause in the mortgage, a
subsequent "sale" of the premises by the
mortgagor, and the legitimate interests of
the mortgagee are not threatened by the
"sale"?

In asking for an opinion, you express concern over the use
of the state's foreclosure laws by federal savings and loan associations
without complying with the rule set forth in Nichols v Ann Arbor
Federal Savings & Loan Association, 73 Mich App 163; 250 NW2d 804
(1977). In Nichols, supra, the Michigan Court of Appeals ruled that
the use of the due-on-sale clause constitutes a restraint on alienation
and consequently would not be enforced unless the lender demonstrates
a threat to its security interest, either by virtue of an increase
in the risk of default on the note or diminished value of the secured
property.

The due-on-sale clause may be described as a provision in the mortgage instrument which permits the lender to accelerate the outstanding balance of the underlying note in the event the secured property is sold without the lender's consent. This approval is normally withheld unless the mortgagor or purchaser of the property agrees to adjust the interest rate on the underlying note to more closely approximate the prevailing rate at the time of the sale of the property. Use of the clause allows the lender to maintain its loan portfolio in a current position, thereby allowing it to escape from unprofitable transactions. To the homeowner, however, the clause prevents the free sale of property by means of a land contract or informal assumption of the mortgage.

In 1976 the Federal Home Loan Bank Board promulgated regulations, 12 C.F.R. 545.6-11(f); 44 Fed Reg 39108, 39149 (1976), as amended,¹ designed to permit federally chartered savings and loan associations to freely enforce the due-on-sale clause by preempting contrary state laws. The resulting dilemma led to numerous lawsuits culminating in the recent decision of the United States Supreme Court in Fidelity Federal Savings & Loan Association v De La Cuesta, et al, ___ US ___; 102 S Ct 3014; 73 L Ed 2d 664 (1982), wherein the Supreme Court ruled that the Federal Home Loan Bank Board preempted state laws through its due-on-sale regulations. With regard to your concern over the employment by federal savings and loan associations of state foreclosure laws, without complying with the state due-on-sale restrictions, the Supreme Court stated:

"The incorporation of state law does not signify the inapplicability of federal law,

¹This regulation is now to be found in 12 C.F.R. 545.8-3(f) (1982).

for 'a fundamental principle in our system of complex national policy' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.' *Hauenstein v Lynham*, 100 US 483, 490 (1879)."
US ____; 102 S Ct at 3024; 73 L Ed 2d at 677

The effect of the Fidelity decision, supra, is that insofar as state laws are concerned, the right of federal savings and loan associations to enforce the due-on-sale clause is incorporated into state law, including the state's foreclosure procedures.

It is my opinion, therefore, that based upon the Supreme Court's decision in Fidelity, supra, a federal savings and loan association may use the state's foreclosure procedure to enforce the due-on-sale clause, without regards to Nichols, supra.


FRANK J. KELLEY
Attorney General