MINUTES OF THE
MEETING OF THE SENATE COMMITTEE
ON JUDICIARY

SIXTY-FIRST SESSION
NEVADA STATE LEGISLATURE
April 7, 1981

The Senate Committee on Judiciary was called to order by Chairman Melvin D. Close at 8:30 a.m., Tuesday, April 7, 1981, in Room 213 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Melvin D. Close, Chairman
Senator Keith Ashworth, Vice Chairman
Senator Don W. Ashworth
Senator Jean E. Ford
Senator William J. Raggio
Senator William H. Hernstadt
Senator Sue Wagner

STAFF MEMBERS PRESENT:

Sally Boyes, Committee Secretary

GUEST LEGISLATORS:

Senator Thomas R. C. Wilson

SENATE BILL NO. 400:

Prohibits acceleration of debt upon sale or transfer of real property.

Senator Thomas R. C. Wilson stated the bill was introduced by the Committee of Commerce and Labor and re-referred, under our standing rules, to this committee. It is one of those bills that addresses a simple problem with a simple solution. Hence, the

full room for this hearing. Nonetheless, it is a simple one and the reason for introducing the bill in the first place was an apparent need to at least examine this problem. The cap has recently come off interest. The industry is drifting toward variable interest mortgages and it has become impossible for one to buy a new house, at least for most. It is impossible for even more to build a new home and now it is becoming financially impossible for one to buy an old home. By assuming, not in the sense of an novation, but assuming an existing loan. The existing practice in that event has been to accelerate what was the interest rate and impose that on a new buyer. The question is whether or not this becomes an unreasonable restriction upon the alienation of property. For that reason there should be some discourse. The problem is a complex one. This legislation was originally requested and recommended by the real estate industry. His understanding is that savings and loan institutions as well as other financial institutions oppose it because their life is complicated by regulations promulgated by Fannie Mae and others. Additionally, the financial community is drifting toward the variable interest mortgages. It is a problem that effects the public interest in this State. Since the cap on interest has been lifted totally, it would mean that interest could be raised to any proportion and it could be made variable in character.

The thrust behind this bill is a narrower question and that is whether or not to render enforceable acceleration clauses. That is to say if a man sells his house to another and there is an existing mortgage on that house with a savings and loan or a bank or some one else, and he, in turn, sells the house to another party, the later sale of the house has no bearing on the first sale if the house is secured with an existing loan. The lender from whom the loan was secured can accelerate the entire thing unless the interest is increased.

Some states by legislation and some states by judicial process, namely California, by the Wellenkamp case, have announced a public policy unless there is some reason why the security is impaired in that kind of transaction that was just illustrated, the acceleration of interest constitutes an unreasonable restriction upon the alienation of property. For that reason it is against the public policy.

The question is negotiable between the new buyer or between the savings and loan or the new bank, but that is the basic issue.

The Wellenkamp case announced a doctrine, which New Mexico has legislated that states if security is impaired in some way, the loan can be accelerated or interest can be raised as the risk has been increased. This bill puts to question if other circumstances justify raising interest. There are a number of counter arguments. The policy of the lending institutions is also involved. Should they enforce the due on sale clause if this type of legislation does not pass. States that legislate or judicial branches rule that acceleration clauses are not enforceable as unreasonable restraints upon alienation of property. Fannie Mae will make its loans callable in seven years instead of the normal, longer term as a matter of federal regulation. That would be a suitable subject for Congress to examine because it is not done by legislation but by regulation.

The entire drift is one of accelerating interest and higher cost of money which means less transfer of property, less commerce and less trade. It is questionable as to whether the passing of this bill will solve anything. State governments and the legislature should review this type of legislation because they all contribute to the same problem.

The matter is a worthy issue and worthy of inquiry. Whether or or not the bill is processed, there should be some understanding reached between lending institutions and those who might wish to buy or sell property. There is technical detail of this bill which will require tremendous processing. The policy question of the bill seems more important than the technical characteristics of the bill.

Senator Raggio asked if the Wellenkamp issue was out of the California Supreme Court.

Senator Wilson Replied it was.

Senator Raggio asked if the Wellenkamp issue, in addition to the restraint on alienation issue, addressed the obvious issue of impairment of contractual obligation, as it may be an issue of the other side.

Senator Wilson stated those were policy questions which would be balanced. The basic policy question would be how

much impairment would exist for the rights of parties in contract; to what extent parties in contract would be allowed to impair the alienation of property. The issue cannot be weighed out of the context of its impact on the financial facts of life. The cost of money seems to accelerate with everything we do.

Senator Hernstadt asked why the prohibition on restraint on alienation would take place after July 1, 1981.

Senator Wilson stated that was what is known as the bill drafters license. That was not the bill request.

Senator Hernstadt stated this would not apply to all mortgages in existence.

Senator Wilson stated that was not his judgement, and he did not endorse it.

Senator Hernstadt asked if it was Senator Wilson's intent to have this applied to all mortgages.

Senator Wilson replied it was and that the bill was requested to be cast in general form.

Senator Hernstadt said it was all home mortgages or mortgages up to four-plex; no commercial or industrial or apartment houses.

Senator Wilson replied the same principals could be applied across the board. He stated he was narrowing the issue.

Senator Hernstadt again asked if the intention was for the bill to apply to all home mortgages.

Senator Wilson replied yes.

Senator Don Ashworth asked about the variable interest rates and whether or not the bill could be passed in other states and also in Nevada, bringing in the variable interest rate which would make this bill moot. There is a move right now to do that. He stated that this action may push the situation farther and quicker to that result.

Senator Don Ashworth stated the consequence may be the same without legislation. Because of what has happened to the interest rate in the United States the last seven or eight years, that industry feels in order to survive, it will have to go to the variable rate. He asked if statistics were available in regard to this type of legislation showing that the process was accelerating faster than was originally thought. Senator Wilson replied that anything that was to impede the increase in the rate of interest, would probably encourage the development of a variable rate of interest. The cause of this is financial pressure.

Senator Wagner asked why the Board of Realtors no longer supports this legislation. Senator Wilson said the board originally supported this bill and later decided not to. That question should be asked of the Board of Realtors. He further stated the bill was processed as a result of considerable interest in this problem. Whether or not the bill is processed, Senator Wilson stated, this issue has public interest and requires exposure and discussion, as well as inquiry. The issue is public and warrants public discussion on the record. The market is becoming impacted because of the rising cost of money. That is a problem that not only homeowners share, but also savings and loans, banks, contractors, builders and anyone else interested in the sale of property.

Senator Don Ashworth stated there may be some problem attempting to make the bill retroactive. The way the bill is written, from a vantage point of being prospective, would be acceptable. The problem with the bill being prospective would be the same thing if there were a complaint if, basically, the institution started a variable rate and were under contract, but were going to honor a variable rate. From a legal stand point, that type of situation could not be done. A binding contract does not mean because of a proceedure change, pre-existing contracts can be altered to coincide with the new proceedure. Future contracts with the knowledge of the new law would be understood to meet any new proceedure.

Senator Hernstadt asked about sales already in existence using a contract of sale. This circumvents the due on sale clause and should contracts of sale be prohibited.

Senator Wilson stated people have gone to the contract of

sale to avoid that kind of problem. It does have numerous problems. It is not a novation or substitution for the borrower. The contract of sale is developed as an avoidance of the pressure of the acceleration of interst. There may be legislation before this committee to try and clarify the proceedure for foreclosure under it.

Senator Close asked for a show of hands in regard to those in favor of the bill and those opposed. He asked for a spokesman as a proponent.

Mr. Paul Perkins, Director of the Reno Board of Realtors, stated the equity of the due on sale clause as it was originally intended was allowed to be put in contracts during the depression days when consummers were fradulently obtaining loans. The loans were granted and were turned over to a friend or relative who defaulted. The lenders were suffering losses and security of the loan was impaired. With the end of the depression, the risk diminished to almost nothing. For the last 40 years the situation has been for the lenders to use that clause for nothing more than to enhance their profits. It was never intended to be used as it has been used and that is the basic issue. Mr. Perkins stated a lender would not give a loan without that clause in the contract. The clause was intended for the lenders security and it should not be omitted.

In regard to the realtors association and the support it has for this bill, it should be noted a survey was conducted of all realtors in the state. It consisted of 10 questions. The number one issue, which 74% of all realtors in this state desired to have pursued, was the due on sale clause. Senator Wilson was asked to produce a bill in regard to this matter.

In January, 1981, the state directors attended a retreat at Lake Tahoe. The result of this retreat was the lenders advocate prevailed. The directors were convinced irreparable harm would be done to the savings and loan associations of this state that are losing money. Many people in the room attended a state directors meeting subsequently held to address this issue more fully. It was stated by the incoming state president that virtually every savings and loan in the state lost money last year. According to a newspaper article in Sunday's Reno paper, even the smallest savings and loan made a profit. Realtors have been mislead. They were told Fannie

Mae would not lend in the state. Flyers were sent to realtors requesting negotiation to reconcile differences between lenders and realtors. The realtors had hoped the negotiation would do what S. B. 400 will do.

The interest rate on an assumption was offered by the lenders to the realtors at 13.5% with one point and a variable rate. The variable rate is here. Whether or not this clause exist in a contract does not have a bearing.

In summary, a paragraph was read from Wellenkamp, page 952. See Exhibit C.

Chairman Close asked if the New Mexico bill was passed and the South Carolina bill. Mr. Perkins stated he was in error; it was the Georgia bill, not New Mexico. Since Wellenkamp and the attorney Fred Crane stood up to the lenders in 1978 and addressed the issue, 11 states have passed legislation or judicial decisions parellel to it.

Senator Raggio asked the date of the Wellenkamp decision. Mr. Perkins stated it was some time in 1978. Senator Raggio asked when the New Mexico decision was passed. Mr. Perkins said it was after Wellenkamp. Senator Hernstadt asked if the bill had a date on it. Mr. Perkins stated Georgia was passed in 1980.

Senator Raggio asked if there had been any adverse effects on those states which enacted legislation; had there been an impact on the savings and loans and had Fannie Mae taken any type of action since this request.

Mr. Perkins stated Fannie Mae has in fact, where this legislation has been passed, written into their new contracts, an option to call the notes in seven years. Should the same person be living in the house at the end of the seven years, the note would not be called. That right would be reserved. Seven years is still better than the RRM and the VRM which is due in three to five years. This is something that will have to be lived with regardless.

Senator Raggio stated the thrust of the legislation would be

to protect those loans that are existing. He could not foresee any loan being made without a variable rate if the legislation is inacted. Mr. Perkins stated if the legislation is not inacted, the same thing will be seen.

Senator Raggio asked what dollar amount would be affected the savings and loans are holding if this legislation is indeed enacted. Mr. Perkins said the savings and loans would have to give that information. He also stated that when that money was loaned, it was at an interest rate of seven to ten percent. They borrowed that same money at half percent or one percent. Now they want to make it on the turn around.

Senator Hernstadt stated that statement was incorrect. The savings and loans are paying through money market certificates and passboo s and have constantly had to raise.

Mr. Perkins stated savings and loans do not have to borrow at 15% to loan a man nine percent money four years ago. Senator Hernstadt stated the money is out and the obligation is on the books. The savers that made the money available to the nine percent loan have either been upgraded on interest or taked the interest and converted it to a money market certificate. That is the option of the saver. The association cannot control that. Senator Herstadt then askedof equity and real nee. With the inflationary cast of home prices, most of the older mortgages with a six to ten percent interest rate represent a small fraction of the selling price of the house. Then a second or a third mortgage is started. An assumption of a mortgage which represents a substantial portion of the purchase price of the house is not assumable.

Mr. Perkins stated that is not necessarily true. A mortgage of two years ago was at 10% or less. Appreciation has not been running at the same rate it was. There is a significant number of homes with existing loans on them. An example is an older couple retired and moved into Reno three months ago. The existing mortgage on the house was $104,000.00, the purchase price was $165,000.00. The couple had to cash to the loan. The lender raised the rate to 13.6% and charged one point. Senator Hernstadt asked the original interest rate. Mr. Perkins stated it was I1%. See Exhibit C in referrence to quote on page 952.

Senator Raggio stated the due on sale provision and the due on

1,278

transfer provision do not address the provision of due on encumbrance. He asked if the word transfer was used to include encumbrances also. Mr. Perkins stated a legal opinion would have to be sought in order to determine that. Senator Raggio then stated that when property is sold on which there is a small security interest to subsequent mortgagee, a lender will put on a high rate, wrap around and get the higher profit. There is quite a profit on a wrap around and does this bill include that or not.

Mr. Perkins stated that it goes back to the impairment of the lenders security. He also said the request was not to eliminate the clause but to return it to the original intent.

Senator Don Ashworth asked Mr. Perkins how the conclusion was made in regard to all the savings and loans in the state having a profitable year. Mr. Perkins stated the newspaper article showed the 1979 profits and the 1980 profits. Virtually every savings and loan association, even the smallest one made $57,000. Senator Ashworth stated that was not a fact. The article is wrong. Mr. Perkins stated the article may be wrong. The Board of Realtors incoming president stated that virtually every savings and loan association in the state lost money last year. Senator Ashworth said that was a fact. Mr. Perkins stated the Reno newspapers should be talked to. Senator Ashworth felt the statement of all savings and loan being profitable last year should be corrected. Mr. Perkins stated it was not relevant. Senator Ashworth asked why it was brought up. Mr. Perkins said he felt the situation should be addressed. Senator Ashworth said facts presented should be true.

Senator Wagner asked for clarification of action. She asked what language should be changed and what else should be done to make this bill appropriate to process. Mr. Perkins stated the date should be extracted. Of the 11 states, none of them have made inception dates. The intent was to have the bill apply to existing loans.

Senator Raggio asked if the Wellenkamp decision had been applied retroactively. Mr. Perkins stated that it was. Senator Wagner asked for a copy of the Wellenkamp decision.

Senator Raggio stated there is a difference between private homeowners and commercial properties; the latter being an income producing property.

Mr. Perkins called attention to line 19 of the bill. He stated the word trustee should be beneficiary.

1,279

Mr. Nick Colonna, President of the State Apartment Association, stated he was not informed of the issue until the past Thursday. He was unaware of the position change of the realtors. He stated he felt the bill should be all inclusive and not be limited to four-plexes. He felt the committee should meet with the industry to work on the wording of the bill. He reiterated further on the due on $ale clause, gave example of the raising interest cost and point change which in some cases, made the home buyer not qualified to purchase a home.

Chairman Close asked for an opponet of the bill so another side of the issue could be heard.

Mr. Ray Gregor, President of Nevada Savings and Loan League stated in Nevada many approved lenders sell a number of the approved loans to the Federal National Mortgage Association, better known as Fannie Mae. One of the primary reasons for selling the loans to this agency is to be able to re-lend dollars on homes in Nevada, the nations fastest growing state. Because of the rapid growth, the state has been capital short. During 1980, nearly $170,000,00 was sold to Fannie Mae. Currently Fannie Mae has a portfolio of nearly 26,000 loans on Nevada resident 1 properties, representing a Fannie Mae loan on one house out of every 15 in the state. Further, Fannie Mae has a total loan portfolio in excess of one billion dollars on Nevada residents. During the past year Fannie Mae has issued the following policy statement: In any state where the due on sale clause is no longer permitted by law, Fannie Mae will no longer purchase mortgages originated on properties within that state's boundries unless they have the right to call those loans totally due as to principal, at a point seven years from the date of origination.

Senator Don Ashworth asked if there is a variable rate situation, the loan would be come due in two years or five years, and it would be applicable, and Fannie Mae would still come in. Mr. Gregor stated no. Fannie Mae does not have a program to pruchase variable rate loans.

Chairman Close stated the position of the other side is that of a seven year fiduciary clause, a clause in the mortgage would say that it will be called whenever a house is sold. That could be every two or three years.

Mr. Gregor stated that those in the savings and loan industry have been charged with the responsibility of creating thrift

1.276

and providing funds for home ownership, primarily for the residents of Nevada. That responsibility has been met by providing multi-billions of dollars in loans to Nevada residents to finance the homes over the years. The industry has over two billion dollars in outstanding real estate loan balances currently on the books. The loans have been made for periods of up to 30 years. There is present legislation that will permit loans now to 40 years. He stated the vast majority of loans which will close after July 1, 1981 will have to written for shorter periods of time or provisions will have to be written in the loan contracts which will permit lenders to review the loan rate at various intervals throughout the life of the loan and adjust the rate upward to cover increases in cost that may exist until the loan is closed. Today the industry is writing loans at variable rates. The majority of the loans are being written at fixed rates. Should S. B. 400 be passed, the death of the fixed rate mortgage will come about more quickly. It will cause the cost of housing to be less affordable to the average Nevada citizen.

Senator Hernstadt asked if an original borrower of a home qualifies and one of the association members grants the loan, then later a subsequent sale is arranged, the subsequent buyer has a financial statement with a strength greater than the original purchaser, how is safety and security of the loan corroded. Is the due on sale clause a restraint. Mr. Gregor stated that in the sighted case there is no impairment. One of the purposes of the clause is for associations to have time to realize people move more rapidly than the life of a loan. Cost will go up during a 30 year period and looking at a loan every six years will help in that matter.

Senator Hernstadt replied that if a deadbeat were the purchaser, then the due on sale clause will be exercised and the lender will be out of the situation. The clause is used to bring interest to market level when a person does qualify for a loan. Mr. Gregor stated the effect of interest rates affects the cost of money. In 1974 the average cost of money was 5½%. Today it is 11 percent. Cost must be covered.

Senator Hernstadt asked why that would be fair to a person who qualified for a loan. Mr. Gregor stated the association was not dealing with the person that already qualified for the loan, they were dealing with the person attempting to assume the loan. There was contractual relationship between a loan association and the original mortgagor. That original mortgagor is no longer involved in the transaction. Senator Hernstadt stated the mortgagor is still involved because the mortgagor is guaranteeing the loan. Mr. Gregor stated frequently the

previous owner is released from liability. Senator Hernstadt asked if the previous owner was released from the liability to the savings and loan. Mr. Gregor said yes.

Senator Wagner asked what was the financial status of savings and loans. Mr. Gregor stated that although he had not read the article about the financial status of savings and loans, he could reply about associations that must publish financial progress because of regulations by the S.E.C. First Western Savings was profitable during 1980. Frontier Savings showed publications of profitability during the first nine months. Other, privately owned associations, do not publish statements.

Senator Wagner asked what other institutions are able to make loans on real property besides savings and loan association. Mr. Gregor replied Thrift companies, banking institutions, both national and state, companies that are called mortgage-banking companies. Senator Wagner asked if there was any impact on lending institutions where legislation had been changed. Mr. Gregor replied there was likely to be some relation to the Wellenkamp decision. The 10 largest associations in California were just recently published, which included the portfolio amount in loans, and it appeared that the majority are writing variable loans.

Chairman Close asked if variable rates were to be a thing of the future, regardless of the out come of S. B. 400. Mr. Gregor felt because of inflation and increased cost, loans would have to be written at vairable rates.

Mr. Don Brodeen, Legislative Chairman for the Nevada Mortgage Bankers Association and Southern Nevada Mortgage Bankers Association read a statement that is Exhibit D and is attached hereto.

Senator Hernstadt asked the average life of a loan. Mr. Brodeen replied the average life of a loan in Nevada in the past has been four and five years. The loan life is growing. Fannie Mae, two weeks ago, changed their opinion and increased the loan life to 15 years. This increases the cost of money because the life of the loan is prolonged. A higher yield on money must be obtained to justify the sale. There is Federal legislation being considered which has not been published yet, which would insert a duo-four clause in a FHA loan. FHA is under heavy restraint as far as the amount of business they can do.

Senator Raggio asked why the term Call Option Rider would not apply to a Federally charted savings and loan association. Mr. Brodeen replied that those associations are governed by the Federal Government. Senator Raggio stated this legislation, even if enacted, would not apply to the one Federally charted savings and loan association in this state. Mr. Brodeen said that was correct. That situation also exists in California. There are several savings and loan associations there that are Federally charted. Senator Raggio asked if this would apply to a national bank. Mr. Brodeen replied that national banks have not been excluded. Chairman Close asked what the one Federally charted savings and loan association in Nevada was. Mr. Brodeen stated it was First Federal Savings and Loan.

Chairman Close asked for testimony from the real estate representatives.

Mr. Gene Milligan, representing the Nevada Association of Realtors, stated a vote was taken at a special meeting in Las Vegas. Of an attendance of about 100 people, two opposed the position the association is taking on the bill. The rest were in favor. This was taken from the Las Vegas Board of Realtors. Mr. Milligan stated profit position shoulc have no bearing on a decision; it should be based on the issues. There are seven real estate boards in the state of Nevada. There is a representative on each board. There was a poll taken and 71% agreed the due on sale clause was a problem. Senator Hernstadt asked what happened to convince the Las Vegas Board of Realtors to change that position. Mr. Milligan said based on that poll, a request was made for this legislation. Subsequent to that time the savings and loan associations came to the Board and indicated the position on the due on sale clause had changed. It is now a compromise position. The savings and loan associations said they would make a policy in writing on an individual basis as to how they would handle that situation and it would involve the increasing of the interest rate to a level not up to the current rate but somewhere in-between. Senator Hernstadt asked if the homeowner was entitled to know in advance what rule would apply to him and not have to depend upon a case by case decision. Mr. Milligan stated it would be an individual situation within each lenders policy. Senator Raggio asked if there would be an understanding of some kind in regard to a gentleperson's agreement. He also asked if all lenders in a savings and loan association had been talked to. Mr. Milligan replied it would be an individual matter and an across the board policy could not

be established. Senator Wagner asked why an across the board policy cound not be established. Mr. Milligan replied Federal law was involved. Senator Raggio stated that since Mr. Milligan was not the spokesman for the savings and loan associations, would the associations be willing to sign a covenant which would set the perimeters for raising the interst on loans. Mr. Milligan said it had not become that formalized. He stated they have taken the position they will publish a stated policy and submit it to members for guidlines when they are dealing in a specific transaction.

Senator Ford stated the testimony of the savings and loan representative made no mention of this at all.

Senator Raggio asked how this policy would be enforced in the future with various changes in association administration.

Mr. Milligan stated through a review process or complaint process whereby the realtors board could go to the savings and loan league and have a review of specific cases. He further stated if the bill did not proceed, realtors would be at the mercy of the industry.

Senator Wagner asked why they would not support the bill. Mr. Milligan stated it was not his decision.

Mr. Milligan went on to reiterate personal opinions of the bill. He then read a statement from Nevada Association of Realtors: Be it resolved the Nevada Association of Realtors joins with the Savings and Loan League of Nevada in a co-operative effort to promote the economic well being of Nevada and assure Nevada the opportunity of home ownership. This was passed by the Nevada Association of Realtors Board of Directors.

Chairman Close called for Mr. Ray Gregor. He then stated to Mr. Gregor that some informal discussions had been held bewteen savings and loan institutions and real estate boards relative to an informal agreement that may be reached on a company by company basis. He asked Mr. Gregor if he was aware of any such agreement. Mr. Gregor stated it was not so much an agreement as it was an attempt on the part of the realtors and savings and loans to improve communications. At the request of the realtors, a meeting of several of the directors of the realtors and several savings and loan members was held. It was explained that the realtors felt some circumstances

1,288

were unreasonale in regard to the handling of some transactions. The lenders asked the realtors if communications could be improved if each group would write down policies in regard to assumptions and the interst rates related thereto. That was already an existing policy of the savings and loans. The realtors stated to them several associations that did not have that. A co-ordination was made to supply this information to the realtors.

Senator Hernstadt asked if an agreement had been reached whereby the difference will be split between the stated rate on the mortgage and the going market rate. Mr. Gregor stated First Western's policy is that on an assumption, if the interest rate is below 11%, then it is raised to 11%, but in no event will the rate be raised less than one percent. This covers the 10 to 11% bracket. In the event the interest rate is above 11%, then the association will raise it one percent. This is current policy and is subject to change and review at any time. Senator Hernstadt asked if there was other association policies. Mr. Gregor stated there were. First Federal Savings and Loan had a policy that said that whatever the interest rate is currently, the market interest rate would be looked at and the difference would be divided. Each association has a different policy.

Senator Ford asked how the realtors knew the policy differences. Mr. Gregor stated any realtor could call the association.

Chairman Close stated these policies have been published in the Las Vegas Board of Realtors newsletter. It has been in practice in that area. Those same policies would need to be published in this area as well.

Senator Wagner asked what is the difference with having the policies published or making a phone call to the association involved. Mr. Gregor stated the associations were doing this upon request. Senator Wagner asked what percentage of real estate loans in this state are due to savings and loan associations. Mr. Gregor stated there are loans on about 50,000 homes. There are approximately 400,000 homes in the state. That makes a percentage of about 12%. As far as other lenders, the percentage is not known to him. Fannie Mae holds about seven percent.

Mr. Larry Miller, Larry Miller Realty, stated he wished to address the committee in regard to the Board of Realtors. He stated he has not found anyone yet who is not in favor of Senate Bill 400. He brought signatures of those people who are against the bill. (See Exhibit E.)

Senator Wagner asked if Mr. Miller was on the Reno Board of Realty. Mr. Miller responded yes, he is a realtor but he is not an official of any capacity.

Mr. Miller stated so far he has not found any opposition to this other than maybe making it an across the board policy. The chairman at the Ad-Hoc Committee was Jack Matthews, who is a savings and loan man himself. He stated some of the opinions were possibly biased. This was not a charge yet as he did not have enough facts to back it up. Chairman Close asked Mr. Gene Milligan if Jack Matthews was the chairman of the Ad-Hoc Committee. Mr. Milligan responded yes.

Mr. Miller stated he was not proposing to eliminate the due on sale clause but to more or less conform to the California position that the burden of proof that a loan is in jeopardy rest upon the savings and loan rather than on the individual buyer or seller. In Nevada, the way this might be proposed here, is the burden of proof being upon the buyer, he has to obtain an attorney, defend his own action and bear the cost of the court case himself. We as realtors have vested interest in this bill but the most important thing felt about it is the publics ability to buy and sell their homes. If the person cannot sell it the lender will be continuing on with the low interest rate of eight, nine or 10%, whatever the case may be, but you could find somebody who could buy the house and assume that loan but could not afford to make the payments if they were increased. The allegation has also been made that the buyer of a home, taking a raff, benefits from the higher interest. Most of the cases seen on the assumption or on a contract of sale or a wrap around, the owner of the house carries the paper, and the average of about 12% is the interest.

Senator Raggio stated they had not talked about this provision which allows the mortgagee to believe in impairment of security. He asked is this language identical to other bills that are being introduced and assuming it is, is a situation opened up where the mortgagee could be the lender by bringing the threat of action. A lender could say he feels his security

1,282

is impaired. Mr. Miller stated that has been done many times. It is the threates before a sale, during and while the sale is in escrow and sometimes after a sale when letters are received from various lending institutions that say come and sign this up or we will call the loan due. In most cases they cave in and run down there for fear of loosing their house and all equity in it.

Senator Raggio stated he realized that did occur but would it occur now or would that be the out that is utilized. Mr. Miller stated it would relieve that.

Senator Don Ashworth stated, for the record, is Mr. Miller in favor of Section 3, Subsection 1, or was he opposed.

Mr. Miller stated he was in favor. As I understand this they can call the note due if their position is in danger. Senator Ashworth stated it is the burden of the lender to go forth with that and not the burden of the purchaser. Mr. Miller stated correct, otherwise he felt that the lender can call all notes due.

Senator Hernstadt asked if Mr. Miller knew why no one had challenged the due on sale clause in the Nevada Courts.

Mr. Ralph Crow stated he had faith in litigation for three years, went to the Nevada Supreme Court and stated the Court will not listen, they dismiss the case. The problem is enforcement. The problem is First American Title Company versus Homes where they set automatic enforcement. Courts automatically enforce these without even listening to the evidence about security being impaired.

Senator Hernstadt stated there has been a case but it was lost. Mr. Crow stated that was a case with a private lender and the loan was called because of a sale. Actually it was a case on a commercial piece of property; instead of impairing the security, the security was enhanced two or three times. The lender called it, because of the sale. The burden of proof is on the borrower and that is the problem. First American Title will site cases where the burden of proof is on the borrower. This is where the problem is, Nevada is just reversed. In California the moot cases were reversed. Nevada has been

following but a reversal has not happened. It is dismissed.

Mr. Miller stated this bill would remove the gray area. At the present time any means are being used to get around it. The public never knows when they will lose everything and realtors never know if they will be sued or not.

Jack Keney, Southern Nevada Home Builders, stated he was opposing the bill and was speaking for the new home building industry. He stated this was a trojan horse. If the Federal Government cuts back as is proposed, it drives people to the Fannie Mae market. Any new loan sold to Fannie Mae would be no more than a seven year loan. That will happen if this bill is passed. He stated Denver has a similar problem as was previously discussed. He made a suggestion for an interium sub-committee.As for the technical parts of this, Mr. Keney stated he would reserve testimony for when it was required.

Chairman Close stated there may not be further testimony.

Mr. Keney stated the industry is trying to save the 30 year mortgage and fighting to get interest rates back to nine or 9.5%. It looks favorable at this time that this will happen through Federal regulation.

Jan Hunt, Broker for Jan Hunt and Associates Realtors, stated her feelings were for the young people that cannot buy a house today. She stated she favored the bill.

Mr. Bill Jowett, realtor from Reno Board, stated there were two reasons why the decision of the Board of Realtors changed. One was that savings and loans were not making money and co-operation was necessary. The other was that three members of this legislative committee were going to abstain from voting on this. Since only one abstaining vote would be necessary to not let the bill pass, the Board felt they would not support the bill than to take a chance on that happening.

The bill needs a separation on two points - one, the impairment of security and the date. He stated he feels the bill should be addressed without the date in it.

Chairman Close stated the commission has voted on the usery situation. There were no abstaining votes and there should be none on this bill.

1,289

Mr. Norm Okada, acting Savings and Loan Commissioner, stated he was representing the Savings and Loan Division, Banking Division and Manufacturing Housing Division. Savings and loans provide over two million dollars in real estate mortgages both State and Federal charters; over one billion is for the one to four properties. The funding rate for the last three months was 42.89%. The association would probably opt for not providing fixed rate mortgages. The superintendant of banks is opposed to this bill. The administrator of real estate housing program requested an admendment to the bill.

Senator Wagner stated no statistics have come from either side of the representatives of this bill showing home sales would increase if this bill were passed. In regard to the states having passed this type of legislation, no statistics have been shown for increased sales there either.

Mr. Chuck Harden, realtor, reiterated on the immorality of the due on sale clause. He stated 75% of the property that was moved since November, December and January was done so without a lender. There was individual financing. 25% was financed by lenders.

SENATE BILL NO. 476:

Clarifies meaning of "interest" in relation to disclaiming interest in property.

Chairman Close asked for responce on S.B. 476. There was no response.

ASSEMBLY JOINT RESOLUTION 14:

Proposes constitutional amendment to provide that records and proceedings of commission on judicial discipline are open to public.

Mr. Guy Shipler, Chairman on Judicial Discipline, stated the commission supports A.J.R. 14 as it had been amended. He stated the commissions reasons as well as his own. Mr. Shipler stated the commission felt it is up to the people whose cases are being heard as to whether or not they want that public.

Chairman Close asked how many complaints had been put into a hearing and how many complaints had there been so far.

Mr. Shipler stated only one complaint went into a hearing but there had been 69 complaints up to the end of last year. He stated the proceedure of a complaint. A complaint is made to the secretary of the commission, then it goes to the full commission. Investigation begins and a determination is made on a complaint. It will either be dismissed or action will be taken. There has never been an action on the three areas that are allowed to be disciplined. Public reprimands are not allowed.

Chairman Close asked how censure is accomplished.

Mr. Shipler said there is a gap between a reprimand and a censure. A public reprimand should be able to be made, but it is not. A censure is public.

Senator Raggio asked if the hearing should be open but only if the person requests to be questioned. Mr. Shipler stated he felt they should be open regardless. The commission feels they should be open only if a person requests it. After discussion with the Chief Justice, the Supreme Court writes the rules and that rule could be changed if the person involved wanted it public. An amendment would not be necessary.

Senator Raggio asked if the commission felt deliberations should be public. Mr. Shipler stated no, even records should be kept confidential. Under this bill they would be public.

Senator Wagner asked if Mr. Shipler supported the first reprint. Mr. Shipler stated yes, but the commission felt it is not necessary to be in the constitution. The commission would accept this but would rather have it read instead of a manditory open hearing, the accused person would need to agree to it.

Mr. Bob Ritter, executive editor of the Nevada Reno Journal stated he represented the Nevada State Press Association. They feel the amended bill had been extremely watered down. He made referrence to the wording of the original bill and stated differences of it and the amended bill. He stated he felt it was an insult to the intelligence of the public and felt that deliberations should be open.

Mr. Arthur Crookshank stated he felt they should be open.

Chairman Close stated further testimony would be continued at 8:30 a.m., on Wednesday, April 8.

Senate Committee on Judiciary
April 7, 1981

Senator Ford moved the minutes of March 23, 24, 25, 26, 27, 30, 31 and April 1 and 2, 1981 meetings be approved.

Senator Wagner seconded the motion.

The motion carried unanimously.

There being no further business, the meeting was adjourned at 11:00a.m.

Respectfully submitted by:

Sally Boyes

Sally Boyes, Secretary

APPROVED BY:

Melvin D. Close, Jr.

Senator Melvin D. Close, Chairman

DATED: April 16, 1981

1287

EXHIBIT A

SENATE AGENDA

COMMITTEE MEETINGS

Committee on JUDICIARY, Room 213.

Day Tuesday, Date April 7, Time 8:30 a.m.

S. B. No. 400--Prohibits acceleration of debt upon sale or transfer of real property.

-S. B. No. 476--Clarifies meaning of "interest" in relation to disclaiming interest in property.

*A. J. R. 14--Proposes constitutional amendment to provide that records and proceedings of commission on judicial discipline are open to public.

EXHIBIT B

ATTENDANCE ROSTER FOR COMMITTEE MEETINGS

SENATE COMMITTEE ON JUDICIARY

DATE: April 7, 1981

PLEASE PRINT NAME	PLEASE PRINT ORGANIZATION & ADDRESS	PLEASE PRINT TELEPHONE
DAN BRODEEN	NEVADA Mtg BANKERS	732-1344
LARRY MILLER	REALTOR 330 E LIBERTY ST RENO NEVADA	329-4068
BILL JOWETT	REALTOR 3500 LAKESIDE CT RENO	827-2111
DAVID MORRIS	—	—
Colleen Dolan	UNR Intern	
Bud Evans	UNR Intern	
Greg Doyce	Realtor 3055 Reuben [illegible]	825 2486
Jack Logan	Realtor 1450 Joshua Reno	329-9856
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	" "	"
[illegible]	[illegible]	[illegible]
[illegible]		
Phil Kline	[illegible] "	826-[illegible]
[illegible]	[illegible]	[illegible]
Phil Perkins	[illegible] 3500 Lakeside Reno, NV	827-2111
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
JOHN KIRKHAM	LARRY MILLER [illegible] 330 E. LIBERTY RENO	329-4068
[illegible]	JUDICIAL DISCIPLINE [illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible] Reno	32[illegible]
[illegible]	[illegible]	[illegible]

Lloyd Mallet	Nannette Rlty	882-1161
Robert Simpson	All State Realty	227-2660
Jim [illegible]	Urman, [illegible]	322-9200
HAL PLUMMER	ALL STATE REALTY	329-7400
KEVIN ELLIOT	ALL STATE REALTY	329-7400

ATTENDANCE ROSTER FOR COMMITTEE MEETINGS

SENATE COMMITTEE ON JUDICIARY

DATE: April 7, 1981

PLEASE PRINT NAME	PLEASE PRINT PLEASE PRINT ORGANIZATION & ADDRESS	PLEASE PRINT TELEPHONE
[illegible]	All State Realty	827-[illegible]
[illegible]	[illegible]	329-7400
[illegible]	All [illegible]	329-7400
[illegible]	" " " "	329-7400
Maggie Stickman	Real Estate [illegible]	359-1276
[illegible]	All State [illegible]	329-7400
[illegible]	All State [illegible]	[illegible]
[illegible]	All State [illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
Tom McCabe	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	" " "	" "
Larry Lewis	" " "	" "
[illegible]	[illegible] 525 [illegible]	[illegible]
[illegible]	" " " "	" "
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	329 4030
[illegible]	[illegible]	[illegible]
[illegible]		
[illegible]	[illegible]	386-5256

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STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
LEGISLATIVE BUILDING
CAPITOL COMPLEX
CARSON CITY, NEVADA 89710

ARTHUR J. PALMER, Director
(702) 885-5627

LEGISLATIVE COMMISSION (702) 885-5627
...H ASHWORTH, Senator, Chairman
Arthur J. Palmer, Director, Secretary

INTERIM FINANCE COMMITTEE (702) 885-5640
DONALD R. MELLO, Assemblyman, Chairman
Ronald W. Sparks, Senate Fiscal Analyst
William A. Bible, Assembly Fiscal Analyst

FRANK W. DAYKIN, Legislative Counsel (702) 885-5627
JOHN R. CROSSLEY, Legislative Auditor (702) 885-5620
ANDREW P. GROSE, Research Director (702) 885-5637

March 27, 1981

MEMORANDUM

TO: Sandy Wilson

FROM: Donald A. Rhodes, Chief Deputy Research Director

SUBJECT: Acceleration of Interest Rates on Residential Mortgages When a New Party Assumes the Loan

I communicated with Ms. Bobbi Merzzada of the American Bankers Association (202) 467-4000 and was advised that 11 states (Arizona, California, Colorado, Georgia, Illinois, Iowa, Michigan, Minnesota, New Mexico, South Carolina and Washington) restrict or prohibit acceleration clauses relating to the maturity date or principal and interest on any loan secured by a mortgage or deed or trust on residential real property.

Enclosed are copies of the provisions from California, Georgia, Iowa and New Mexico for your review.

Also enclosed is a case (see Wellenkamp v. Bank of America 21 Cal. 3d 943) which addresses the California law. As you can see on page 952 of the case, the court held:

> We furthermore reject defendant's contention that the lender's interest in maintaining its loan portfolio at current interest rates justifies the restraint imposed by exercise of a due-on clause upon transfer of title in an outright sale. Although we recognize that lenders face increasing costs of doing business and must pay increasing amounts to depositors for the use of their funds in making long-term real estate loans as a result of inflation and a competitive money market, we believe that exercise of the due-on clause to protect against this kind of business risk would not further the purpose for which the due-on clause was legitimately designed, namely to protect against impairment to the lender's security that is shown to result from transfer of title.

I called a friend of mine, Carlye Brakensiek, who is the consultant to the California Assembly Committee on Finance, Insurance and Commerce, to obtain some information on the acceleration topic. He said that a bill introduced by Assemblyman Bruce Young last year, A.B. 748, would have amended California's law to permit acceleration. The bill died in the assembly.

DAR:jlc
Encl.

[L.A. No. 30776. Aug. 25, 1978.]

CYNTHIA J. WELLENKAMP, Plaintiff and Appellant, v.
BANK OF AMERICA et al., Defendants and Respondents.

SUMMARY

A real property purchaser sought an injunction against automatic enforcement by the seller's lender of the due-on-sale clause contained in the seller's deed of trust and promissory note, and also sought a declaration that such automatic exercise of the clause, without any showing of impairment of security, constituted an unreasonable restraint on alienation. Defendant's demurrer to the complaint was sustained without leave to amend. (Superior Court of Riverside County, No. 113826, Elwood M. Rich, Judge.)

The Supreme Court reversed, holding that an institutional lender cannot enforce a due-on-sale clause in a promissory note or deed of trust unless the lender can demonstrate that enforcement is reasonably necessary to prevent impairment of the security or risk of default. The court further held that, where a complaint for declaratory relief presents an actual controversy, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration. (Opinion by Manuel, J., with Bird, C. J., Tobriner, Mosk, Richardson and Newman, JJ., concurring. Separate dissenting opinion by Clark, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Deeds of Trust § 2—Definitions and Distinctions—Due-on Clause. —A due-on clause is a device in real property security transac-

1,294

tions to provide, at the lender's option, for acceleration of the maturity of the loan upon the sale, alienation or further encumbrancing of the real property security.

(2) Declaratory Relief § 9—Pleadings—Sufficiency of Complaint.—A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court. Where these requirements are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration.

(3a, 3b) Perpetuities and Restraints on Alienation § 4—Suspension of Power of Alienation—Unreasonable Restraints.—The rule voiding conditions that restrain alienation (Civ. Code, § 711), applies only to unreasonable restraints. The greater the quantum of restraint that would result from enforcement, the greater must be the justification for that enforcement.

(4a-4c) Deeds of Trust § 6—Validity—Due-on-sale Clause—Necessity for Impairment of Security.—A due-on-sale clause contained in a promissory note or deed of trust cannot be enforced by an institutional lender upon the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or risk of default. (Overruling *Coast Bank* v. *Minderhout* (1964) 61 Cal.2d 311 [38 Cal.Rptr. 505, 392 P.2d 265] and disapproving *Hellbaum* v. *Lytton Sav. & Loan Assn.* (1969) 274 Cal.App.2d 456 [79 Cal.Rptr. 9], and *Cherry* v. *Home Sav. & Loan Assn.* (1969) 276 Cal.App.2d 574 [81 Cal.Rptr. 135], to the extent they contain language contrary to the views expressed.)

[See Cal.Jur.3d, Deed of Trust, § 40; Am.Jur.2d, Mortgages, § 342.]

(5) Deeds of Trust § 4—Form and Content—Due-on-sale Clause—Effect of Inclusion in Promissory Note.—The intent of Civ. Code, § 2924.5, providing that the due-on-sale clause in a deed of trust must be included in the promissory note, is to provide notice to the borrower. Thus, the fact that a due-on-sale clause was included in a borrower's

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COUNSEL

Fred Crane

Jerome Za
Kipperman
as Amici C

George W.
Judge for D

McKenna &
Hahn, Cazi
Curiae on b

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promissory note did not make the clause automatically enforceable against the borrower as part of the debt itself, where the clause in the deed of trust had been held unenforceable.

(6) Deeds of Trust § 8—Rights, Duties and Liabilities—Acceleration of Obligation—Statutory Provisions.—Civ. Code, § 2924.6, prohibiting acceleration of an obligation in certain specified situations, was not intended to sanction acceleration in all other situations.

(7) Courts § 34—Decisions and Orders—Prospective and Retroactive Decisions—Supreme Court—Overruling Formal Decisions.—A decision of a court of supreme jurisdiction overruling a former decision is generally retrospective in its operation.

(8) Deeds of Trust § 6—Validity—Due-on-sale Clause—Retrospective Application.—The rule against automatic enforcement of due-on-sale clauses in deeds of trust or promissory notes is retrospectively applicable except in cases where enforcement of such a clause has resulted in sale by foreclosure or in discharge of the accelerated debt, or where enforcement has been waived in return for a modification of the existing financing.

COUNSEL

Fred Crane for Plaintiff and Appellant.

Jerome Zamos, Kipperman, Shawn, Keker & Brockett, Steven M. Kipperman, Friedman & Sloan, Stanley J. Friedman and Gary Garfinkle as Amici Curiae on behalf of Plaintiff and Appellant.

George W. Coombe, Jr., Harris B. Taylor, Alfred T. Twigg and John A. Judge for Defendants and Respondents.

McKenna & Fitting, Bernard Kolbor, Aaron M. Peck, Thomas A. Seaton, Hahn, Cazier, Hoegh & Leff, Arthur Fine and Andrew E. Katz as Amici Curiae on behalf of Defendants and Respondents.

OPINION

MANUEL, J.—(1) (See fn. 1.) We address today the question whether enforcement of a due-on clause,[1] contained in a deed of trust securing real property, upon an outright sale of that property, constitutes an unreasonable restraint on alienation in violation of California law.

In July 1973, Birdie, Fred and Dorothy Mans (Mans) purchased a parcel of real property in Riverside County which they financed by a loan from defendant Bank of America in the amount of $19,100 (at 8 percent interest per annum) giving the bank their promissory note secured by a deed of trust. The deed of trust contained the standard due-on clause which provided that if the trustor (the Mans) "sells, conveys, alienates . . . said property or any part thereof, or any interest therein . . . or becomes divested of [his] title or any interest therein . . . in any manner or way, whether voluntarily or involuntarily, . . . Beneficiary shall have the right at its option, to declare said note . . . secured hereby . . . immediately due and payable without notice. . . ." The Mans' deed of trust named defendant Continental Auxiliary Company as trustee.

In July 1975, plaintiff Cynthia Wellenkamp purchased the property from the Mans. She paid the Mans the amount of their equity in the property, that is, the difference between the total selling price to plaintiff and the balance outstanding on the Mans' loan, and agreed with the Mans to assume the balance of their loan from defendant. A grant deed, transferring title to plaintiff was recorded on July 10, 1975. Defendant bank (hereinafter defendant) was given prompt notice of the transfer of title to plaintiff as well as her check for the July payment on the Mans' loan. Defendant thereupon returned this check to plaintiff with a letter notifying her of its right to accelerate upon transfer of the property by the Mans. The letter offered to waive defendant's right to accelerate in return for plaintiff's agreement to assume the Mans' loan at an increased rate of interest (from the original 8 percent to 9½ percent per annum). A printed assumption agreement was enclosed with defendant's letter for plaintiff's signature.

Upon plaintiff's failure to accede to defendant's demand that the interest on the loan be raised to the then current rate, defendant filed a notice of default and election to sell under the deed of trust.

[1]A due-on clause is a device commonly used in real property security transactions to provide, at the option of the lender, for acceleration of the maturity of the loan upon the sale, alienation or further encumbering of the real property security.

1,297

Plaintiff then filed the present action in which she sought an injunction against enforcement of the due-on clause, and a declaration that exercise of such a clause, without any showing that defendant's security had been impaired as a result of the sale of the property to plaintiff, constituted an unreasonable restraint on alienation in violation of California law.

After the superior court granted plaintiff's motion for a preliminary injunction restraining defendant's foreclosure sale of the property, defendant demurred to plaintiff's complaint on the ground that it failed to state facts sufficient to constitute a cause of action for declaratory relief because automatic enforcement of a due-on clause after transfer of the property in an outright sale is valid under California law, and therefore, plaintiff could not prevail on the merits. After a hearing the superior court sustained the general demurrer, without leave to amend, and entered a judgment dismissing plaintiff's complaint.[2] This appeal followed.

(2) A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court. (Code Civ. Proc., § 1060; *Maguire* v. *Hibernia Sav. and Loan Soc.* (1944) 23 Cal.2d 719 [146 P.2d 673, 151 A.L.R. 1062].) If these requirements are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to favorable declaration. (*Bennett* v. *Hibernia Bank* (1956) 47 Cal.2d 540, 550 [305 P.2d 20]; *Columbia Pictures* v. *DeToth* (1945) 26 Cal.2d 753 [161 P.2d 217, 162 A.L.R. 747].)

The complaint herein alleges a controversy over the legal rights and duties of plaintiff and defendant under the deed of trust containing a due-on clause. Plaintiff contends that this clause is unenforceable absent a showing by the lender of impairment to its security; whereas defendant contends that it can automatically enforce the clause without any further showing. It is clear that the complaint shows the existence of an actual controversy sufficient to state a cause of action for declaratory relief. Therefore, the trial court committed error when it tested the sufficiency of

[2] In April 1976 the parties filed a stipulation for deferring foreclosure, whereby defendant agreed to refrain from taking further action to foreclose the deed of trust during the pendency of this appeal and plaintiff agreed to pay defendant the amount of the monthly payments on the Mans' loan.

1,298

the complaint by a determination of the merits and sustained the demurrer on the ground that no cause of action for declaratory relief had been stated. Defendant urges that, notwithstanding this procedural error by the trial court, judgment of dismissal should nonetheless be affirmed on appeal because plaintiff would not be entitled to a favorable declaration on remand. Defendant bases this proposal on its contention that automatic enforcement of the due-on clause after transfer of the subject real property in an outright sale does not constitute an unreasonable restraint on alienation. We do not agree.

(3a) We begin our discussion with a summary of the California law on restraints on alienation. Civil Code section 711 sets forth the basic law on the subject and states simply that "[c]onditions restraining alienation, when repugnant to the interest created, are void." Our decision in *Coast Bank* v. *Minderhout* (1964) 61 Cal.2d 311 [38 Cal.Rptr. 505, 392 P.2d 265], recognized that this rule was not absolute in its application, but forbade only *unreasonable* restraints against alienation. (4a) In determining whether a due-on clause was unreasonable in *Coast Bank* we looked at whether the restraint was necessary to prevent impairment to the lender's security. We concluded that the restraint was reasonable in that case.

We next had occasion to determine whether a given restraint was unreasonable within the meaning of *Coast Bank* in *La Sala* v. *American Sav. and Loan Assn.* (1971) 5 Cal.3d 864 [97 Cal.Rptr. 849, 489 P.2d 1113]. The restraint involved in *La Sala* was a due-on clause which provided for acceleration of the maturity of the loan upon encumbrance of the subject property. In determining whether enforcement of this clause constituted an unreasonable restraint on alienation, we considered not only whether the restraint was necessary to prevent impairment to the lender's security, but also the effect that enforcement of the restraint would have on alienation. We concluded that enforcement of a due-on clause upon encumbrance of the subject property involved a significant restraint on alienation such as to preclude enforcement of the clause unless the lender could show that enforcement was reasonably necessary to protect its security.

Three years later, in *Tucker* v. *Lassen Sav. & Loan Assn.* (1974) 12 Cal.3d 629 [116 Cal.Rptr. 633, 526 P.2d 1169], we confronted the question whether automatic enforcement of a due-on clause upon the sale of the subject property by installment contract constituted an unreasonable restraint against alienation. (3b), (4b) Examining the principles developed in *LaSala* we recognized that a direct relationship exists between

1.299

the *justification* for enforcement of a particular restraint on the one hand, and the *quantum of restraint*, the actual practical effect upon alienation which would result from enforcement, on the other. Thus, the greater the quantum of restraint that results from enforcement of a given clause, the greater must be the justification for that enforcement. Applying this test in *Tucker* v. *Lassen Sav. & Loan Assn., supra*, 12 Cal.3d 629, we concluded that enforcement of a due-on clause upon sale of the property by installment contract involved a high quantum of restraint requiring a significant showing that enforcement was necessary to protect the lender's security.

We now proceed to apply the principles set forth in *La Sala* and *Tucker* to the case at bench which presents the issue, stated at the outset of this opinion, whether a due-on clause contained in a promissory note or deed of trust may be automatically enforced upon an outright sale of the property securing the loan.[3]

We first discuss the *quantum of restraint* imposed by enforcement of the due-on clause after transfer of the property by outright sale, for if, as defendant contends, automatic exercise of the clause in these circumstances results in little, if any, restraint on alienation, we need not reach the question whether there exists justification sufficient to warrant enforcement.

Although we suggested in dicta in both *Tucker* and *La Sala* that the restraint on alienation resulting from acceleration after an outright sale appeared to be de minimis, we indicated in those decisions that by the term "outright" sale, we were referring to transactions wherein the seller/trustor received full payment from the buyer, usually through new financing of the purchase (an "all cash to seller" sale). We reasoned that the restraint on alienation was slight in such cases because the seller received payment sufficient to discharge the balance of the loan secured by the deed of trust,[4] whereas in cases involving junior encumbrances or installment land contracts, the seller normally received only a fraction of the balance outstanding on the loan.

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[3]We note that there are a number of decisions in other jurisdictions which reach differing results on the question whether a due-on clause can be automatically enforced upon the occurrence of an outright sale of the subject property. A lengthy discussion of these decisions is unnecessary, however, as we feel that our own decisions in *Tucker* and *La Sala* provide both an adequate and appropriate basis for determining what the law is in California on this question.

[4]Indeed, in substantially all cases wherein new financing is obtained the escrow instructions will contemplate direct payment of the existing loan balance to the lender.

We do not here so restrict the meaning of the term "outright sale," but instead, and in accordance with actual real estate parlance, we refer by that term to any sale by the trustor of property wherein legal title (and usually possession) is transferred.

Outright sales of real property commonly involve different types of financing arrangements depending upon the circumstances existing at the time of sale. Thus, when new financing is available and economically feasible, a buyer will be able to arrange to pay the seller the purchase price in full, in an "all cash to seller" arrangement. When, however, new financing is unavailable or is economically unfeasible, the buyer may arrange, as did plaintiff herein, to pay the seller only the amount of the seller's equity in the property, agreeing to assume or take "subject to" the existing deed of trust, in a "cash to loan" arrangement.[5]

The availability of new financing often depends upon general economic conditions. In times of inflation, when money is "tight" and funds available for real estate loans are in short supply, new financing may be difficult, if not impossible to obtain. The same result may occur when interest rates and the transactional costs of obtaining new financing are high, making it economically unfeasible for the buyer to acquire a new loan. When economic conditions are such that new financing is either unavailable or economically unfeasible, the seller and buyer will normally agree to a form of financing arrangement wherein the buyer will assume the seller's loan. In such circumstances, if the lender is unwilling to permit assumption of the existing loan, and instead elects to enforce the due-on clause, transfer of the property may be prohibited entirely, because the buyer will be unable to substitute a new loan for the loan being called due, and the seller will not receive an amount from the buyer sufficient to discharge that loan, particularly when the balance due is substantial. (See 1 Miller & Starr, Current Law of Cal. Real Estate, pt. 1 (1975 ed.) § 3:65, pp. 435-436.) Even when the lender is willing to waive its option to accelerate in return for the assumption of the existing loan at an increased interest rate, an inhibitory effect on transfer may still result. The buyer, faced with the lender's demand for increased interest, may insist that the seller lower the purchase price. The seller would then be forced to choose between lowering the purchase price and absorbing the loss with the resulting reduction in his equity interest,[6] or refusing to

[5]Other financing arrangements that may be utilized in these circumstances include transactions wherein the seller takes back a second deed of trust or an "all-inclusive" deed of trust.

[6]A state policy that home equities are to be protected and conserved is set forth in Health and Safety Code section 50007 (formerly § 41007).

go through with the sale at all. In either event, the result in terms of a restraint on alienation is clear.[7] (See Note, *Judicial Treatment of the Due-On-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability* (1975) 27 Stan.L.Rev. 1109, 1113.)

It is against this effect on alienation that we must measure the factors advanced in justification. In *Tucker* we held that a restraint on alienation could be justified only when a legitimate interest of the lender was threatened. We indicated that such interests, which pertain to protection against impairment to the lender's security, included preservation of the security from waste or depreciation and protection against the "moral risks" of having to resort to the security upon default by an uncreditworthy buyer. (See Hetland, *Real Property and Real Property Security: The Well-Being of the Law* (1965) 53 Cal.L.Rev. 151, 170; see also Cal. Real Estate Secured Transactions (Cont.Ed.Bar 1970) § 4.56, p. 184.)

Defendant contends that the risk of waste and default is significant in an outright sale because both possession and legal title to the property are transferred, thereby eliminating any incentive or ability that the seller/trustor would have to avoid realization of these risks by action of the buyer. Although we have previously distinguished on this basis both the junior encumbrance, where neither possession nor legal title was transferred (*La Sala*), and the installment land contract, where possession but not legal title was transferred (*Tucker*), we are now convinced that, although the original borrower/seller no longer retains an interest in the property after transfer of legal title in an outright sale involving no secondary financing by the seller (see fn. 5, *ante*),[8] this fact does not

[7] The argument of the dissent—that our holding places the seller of encumbered real property at a "competitive advantage" over the seller of unencumbered real property in periods of rising interest and tight money—simply misses the point. The fact that market conditions may operate to hamper the sale of some real property during such periods certainly cannot be held to justify the hampering of all such sales regardless of whatever financing arrangements may be outstanding against such property. Sellers of unencumbered real property have presumably benefited from lower interest rates in achieving their position. To require sellers of encumbered real property, who have not enjoyed this benefit, to suffer from market contingencies along with those who have, is to take a very narrow view of "competitive advantage." In any event we here concern ourselves with the effect of due-on provisions in the sale of properties subject to existing financing—not with the effect of market conditions upon properties not subject to existing financing. To the extent that such clauses hamper alienation of properties in the former category, a restraint upon alienation occurs.

[8] When the seller does not receive the value of his equity in cash but takes back a second or "all-inclusive" deed of trust for a portion thereof, he of course retains an equity interest in the property which provides him with an incentive to prevent waste or default. In this case, then, both the buyer and the seller have an interest in preserving the security. The lender's position thus resembles that occupied by it in the context of an installment

necessarily increase the risk to the lender that waste or default will occur. Thus the buyer in an outright sale, in order to pay off the seller's equity, may make a large down payment on the property, thereby creating an equity interest in the property *in him* which is sufficient to provide an adequate incentive not to commit waste or permit the property to depreciate. Moreover, the buyer in such an outright sale may be at least as good, if not a better credit risk than the original borrower/seller. We therefore conclude that although circumstances may arise in which the interests of the lender may justify the enforcement of a due-on clause in the event of an outright sale, the mere fact of sale is not in itself sufficient to warrant enforcement of the clause, and the restraint on alienation resulting therefrom, in the absence of a showing by the lender that such circumstances exist.[9]

We furthermore reject defendant's contention that the lender's interest in maintaining its loan portfolio at current interest rates justifies the restraint imposed by exercise of a due-on clause upon transfer of title in an outright sale. Although we recognize that lenders face increasing costs of doing business and must pay increasing amounts to depositors for the use of their funds in making long-term real estate loans as a result of inflation and a competitive money market, we believe that exercise of the due-on clause to protect against this kind of business risk would not further the purpose for which the due-on clause was legitimately designed, namely to protect against impairment to the lender's security that is shown to result from a transfer of title.[10] Economic risks such as those caused by an inflationary economy are among the general risks inherent in every lending transaction. They are neither unforeseeable nor unforeseen. Lenders who provide funds for long-term real estate loans should and do, as a matter of business necessity, take into account their projections of future economic conditions when they initially determine the rate of payment and the interest on these long-term loans. (See Note, *Judicial Treatment of the Due-On-Sale Clause: The Case for Adopting*

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land sale contract. (See 1 Miller & Starr, Current Law of Cal. Real Estate, pt. 1, *supra*, § 3.65, pp. 439-440, fns. 15 and 16 and accompanying text.)

[9]In the instant case the party seeking enforcement of the due-on clause is an institutional lender. We limit our holding accordingly. We express no present opinion on the question whether a private lender, including the vendor who takes back secondary financing, has interests which might inherently justify automatic enforcement of a due-on clause in his favor upon resale.

[10]Automatic enforcement of the due-on clause is not the only method by which lenders can adjust the yield from their loan portfolios to meet increases in the cost of funds for these loans. With the enactment of Civil Code section 1916.5, the variable interest rate mortgage has become an attractive and viable alternative.

Standards of Reasonableness and Unconscionability, supra, 27 Stan.L.Rev. at p. 1117.) Unfortunately, these projections occasionally prove to be inaccurate. We believe, however, that it would be unjust to place the burden of the lender's mistaken economic projections on property owners exercising their right to freely alienate their property through the automatic enforcement of a due-on clause by the lender.[11] As we stated in *La Sala,* ". . . a restraint on alienation cannot be found reasonable merely because it is commercially beneficial to the restrainor. Otherwise one could justify any restraint on alienation upon the ground that the lender could exact a valuable consideration in return for its waiver, and that sensible lenders find such devices profitable." (5 Cal.3d at pp. 880-881, fn. 17.)

(5) (See fn. 12.), (6) (See fn. 13.), (4c) For the foregoing reasons, we hold that a due-on clause contained in a promissory note or deed of trust[12] cannot be enforced upon the occurence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default.[13] We therefore disapprove *Hellbaum* v. *Lytton Sav. & Loan Assn., supra,* 274 Cal.App.2d 456 and *Cherry* v. *Home Sav. & Loan Assn., supra,* 276 Cal.App.2d 574, and overrule to the extent inconsistent with this opinion the case of *Coast Bank* v. *Minderhout, supra,* 61 Cal.2d 311.

(7), (8) It is urged that our decision should be given a purely prospective effect, given the reliance on existing laws by lenders when they entered into long-term real estate loan contracts. "It is the general

[11] We note that lenders have utilized the exercise of a due-on clause for other purposes in addition to maintaining their loan portfolios at current rates of interest. The clause has also been used as a lever to exact substantial consideration from the buyer in the form of assumption and waiver fees. (See *Cherry* v. *Home Sav. & Loan Assn.* (1969) 276 Cal.App.2d 574 [81 Cal.Rptr. 135]; *Hellbaum* v. *Lytton Sav. & Loan Assn.* (1969) 274 Cal.App.2d 456 [79 Cal.Rptr. 9].)

[12] Defendant argues that even if the due-on clause contained in the deed of trust were held not to be automatically enforceable because it constitutes an unreasonable restraint on alienation, inclusion of the due-on clause in the promissory note, as required by Civil Code section 2924.5 for property containing four or fewer residential units, would make that clause part of the debt itself and therefore automatically enforceable on that basis. It is clear that the purpose of Civil Code section 2924.5 is to provide notice to the borrower; it cannot be reasonably interpreted in the manner that defendant suggests.

[13] We reject defendant's contention that Civil Code section 2924.6, which prohibits acceleration after the events listed therein, sanctions acceleration in other situations not specifically mentioned in that legislation. The Legislature, in enacting section 2924.6, expressly disclaimed any such intent: "This act is not intended to affect the application of any other provision or principle of law to any type of acceleration provision other than those specifically described in this act." (Stats. 1975, ch. 850, § 2.)

1304

rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation . . . ." (*County of Los Angeles* v. *Faus* (1957) 48 Cal.2d 672, 680-681 [312 P.2d 680].) We see no reason to depart from this rule in this case merely because of the lenders' expectations that they would derive economic benefits from enforcement of the due-on clause. (See *Texas Co.* v. *County of Los Angeles* (1959) 52 Cal.2d 55 [338 P.2d 440].) However, given the importance of the stability of real estate titles and the interest in preserving completed real estate financing arrangements, we hold that this decision shall not apply when the lender, prior to the date that this decision becomes final, has either enforced the due-on clause, resulting in sale of the subject property by foreclosure or in discharge of the accelerated debt, or when the lender has waived enforcement of the due-on clause in return for an agreement with the new buyer modifying the existing financing.

The judgment is reversed.

Bird, C. J., Tobriner, J., Mosk, J., Richardson, J., and Newman, J., concurred.

CLARK, J., Dissenting.—Holding that exercise of a "due-on clause" upon outright sale of real property unreasonably restrains that sale, the majority opinion either misreads or rejects the very decisions on which it relies, particularly *Tucker* v. *Lassen Sav. & Loan Assn.* (1974) 12 Cal.3d 629 [116 Cal.Rptr. 633, 526 P.2d 1169]. Additionally, the majority opinion awards the owner of encumbered real property a bonus in that he can now sell his property for something in excess of what he could sell it for if unencumbered.

We have thus come full circle. In attempting to take away contractual rights of lenders in order to assist borrowers in selling encumbered properties, the majority opinion has devised a scheme which affords yesterday's borrower a clear advantage over today's seller who comes to the marketplace with his property free from encumbrance. But our beneficence may be shortsighted. For in attempting to assist the Wellenkamps, the majority opinion must necessarily restrict if not dry up mortgage funds otherwise available to the next generation of borrowers.

I briefly review the route by which we arrive at the threshold of today's decision. In *Coast Bank* v. *Minderhout* (1964) 61 Cal.2d 311 [38 Cal.Rptr. 505, 392 P.2d 265], our unanimous court agreed that reasonable restraints

on alienation of real property were lawful, and held that it was reasonable for a lender to condition its continued extension of credit to borrowers "on their retaining their interest in the property that stood as security for the debt." (*Id.*, at p. 317.)

In *La Sala* v. *American Sav. & Loan Assn.* (1971) 5 Cal.3d 864 [97 Cal.Rptr. 849, 489 P.2d 1113], we dealt with a due-on-encumbrance clause and distinguished *Coast Bank.* We first noted that enforcement of a due-on-sale clause as in *Coast Bank* was justified because of lender concern for a borrower's continued interest in maintaining the property, but concluded that because the creation of a junior encumbrance in the property did not terminate the borrower's continuing interest, enforcement of the due-on clause was not necessary to protect the lender. We held that enforcement of a due-on-encumbrance clause could thus be an unreasonable restraint on alienation. (*Id.*, at p. 880.) However, a near unanimous court noted that if particular circumstances indicated the lender's security was endangered "the enforcement of the due-on-encumbrance clause may be reasonably necessary . . ." (*id.*, at p. 881), relying on *Coast Bank* (*id.*, at p. 882).

Finally, in *Tucker* v. *Lassen Sav. & Loan Assn., supra,* 12 Cal.3d 629, we dealt with a due-on clause in the context of a proposed installment sale contract. We reviewed the existing law, refined the rules announced in *Coast Bank* and *La Sala* and proclaimed that the reasonableness of a restraint on alienation is to be measured by balancing the quantum of resulting restraint when a borrower is forced to comply with a due-on clause, against the justification for the restraint, that is, the measure of the hazard to the lender's security should the property be alienated as proposed. We unanimously concluded that the restraint was not reasonably justified when weighed against the quantum of restraint imposed on the borrower in an installment sale context. But as in *La Sala* we reaffirmed *Coast Bank* by demonstrating decreased justification for—and increased quantum of restraint in—an installment sale when compared with an outright sale. (*Id.*, at p. 638.)

The majority opinion now proposes to abandon what *Coast Bank, La Sala* and *Tucker* have taught us. Having recognized the due-on clause in junior encumbrances and installment sales to constitute unreasonable restraints *only* because they were deemed to require striking a *different* balance from that in an outright sale, the majority opinion leaps to the conclusion that a due-on clause in an outright sale is unenforceable, thus obliterating our prior distinction.

While the majority opinion purports to weigh justification for restraint against quantum, it errs by failing to accurately weigh relevant factors. It first recognizes that if "automatic exercise of the clause in these circumstances results in little, if any, restraints on alienation, we need not reach the question whether there exists justification sufficient to warrant enforcement." (*Ante,* p. 949.) It then purports to weigh the restraint which may result to the seller. In doing so, it must guess the marketplace. It imagines a market condition whereby money is "tight" or unavailable, and lenders are reluctant to loan except at interest rates higher than that at which the seller is obligated on an older existing loan. Exercise of a due-on clause in such circumstances, the opinion argues, restrains the seller because he cannot sell except by taking cash or a note for his "equity." If the lender is unwilling to permit assumption of its loan at the original interest rate, the seller is unreasonably restrained from selling his house. So it is argued.

What the majority opinion fails to recognize is that the "restraint" in its hypothetical case results not from exercise of the contractual clause but rather from the bleak and unpredictable economic conditions it paints. Of course, whenever money is tight and interest rates are high, a brake on those sales requiring financing naturally results.[1] A seller possessing property and a buyer lacking sufficient funds can seldom do business if financing is unavailable. It may be they cannot do business at all because of the seasonal unavailability of funds to the prospective buyer.[2] If they can do business other than by a contract of sale it follows that the buyer must pay the going interest rate and the seller, as an incentive to the buyer, may be required to reduce the selling price. If a loan exists on the property with a due-on clause, no *increased* restraint on selling results if the lender cannot accept the proposed buyer, the situation then being the same as in the case of the unavailability of funds to the proposed buyer. If the lender will permit assumption but only at an increased interest rate, again no *increased* restraint results because without the existing loan the buyer would be required to pay the higher interest rate and the seller may be required to compromise his selling price. There is thus no increased restraint on alienation beyond that inherent in the economic conditions

[1] If the sale does not require outside financing, there is no problem as there is money available to retire the outstanding loan. The majority opinion also recognizes there is no problem when a tight money market does not exist: "Thus, when new financing is available and economically feasible, a buyer will be able to arrange to pay the seller the purchase price in full, . . ." (*Ante,* p. 950.)

[2] They could, of course, do business by a contract of sale. (*Tucker* v. *Lassen Sav. & Loan Assn.* (1974) 12 Cal.3d 629 [116 Cal.Rptr. 633, 526 P.2d 1169].)

1307

postulated by the majority. But is it the province of this court to predict the unpredictable?

The net result of the majority opinion is best illustrated by analyzing the real effect on all parties upon denying the lender its contractual right to exercise a due-on clause. As we have noted, in a tight money market, the seller of unencumbered real property is already seriously handicapped. However, if his neighbor's home possesses an existing loan with a now unenforceable due-on clause, that seller is granted an immediate competitive advantage. In spite of his original agreement, he can now "sell" the loan without regard to the lender's wishes. His buyer has automatic financing where none is otherwise available. The interest he will be required to pay is less than market. Because that seller has a marketable, sought-after asset in the form of a low-interest transferable loan—something he never bargained for—he can ask for and expect to get additional considerations from his buyer. And the buyer may also look forward to the same advantage on resale. The loan has thus become not a restraint on alienation but a factor making salable what before could not be sold.[3]

The majority opinion, after declaring the due-on clause imposes a serious restraint in the circumstances it postulates, proceeds to negate justification. It declares that factors this court has unanimously deemed to justify exercise of the clause in the past are of little consequence now. It acknowledges that we have—up to now—held that a lender could exercise a due-on clause on an outright sale to protect interests "which pertain to protection against impairment to the lender's security, included preservation of the security from waste or depreciation and protection against the 'moral risk' of having to resort to the security upon default by an uncreditworthy buyer. (See Hetland, *Real Property and Real Property Security: The Well-Being of the Law* (1965) 53 Cal.L.Rev. 151, 170; see also Cal. Real Estate Secured Transactions (Cont.Ed. Bar 1970) § 4.56, p. 184.)" (*Ante*, p. 951.) However, the opinion dismisses such recognized usage with the gratuitous comment that "we are now convinced that,

[3]The majority cling to the thesis that its decision today serves to eliminate restraints on alienation. However, in footnote 7 (*ante*, p. 951) it concedes its concern *only* for properties with existing financing to the disadvantage of unencumbered properties, when such properties are competing on the same market. In an attempt to justify its lack of equal concerns, it argues that sellers of unencumbered real property "have presumably benefitted from lower interest rates in achieving their position," and now such advantage should be balanced in favor of those who have not benefited, they being the sellers of encumbered real property. The presumption by the majority is completely gratuitous —nothing in the record nor in sound reason supports it. The declared policy is manifestly one which would be better left to our Legislature.

1308

although the original borrower/seller no longer retains an interest in the property after transfer of legal title in an outright sale . . . this fact does not necessarily increase the risk to the lender that waste or default will occur." (*Ante*, pp. 951-952.) The majority refers to no authority in support of its conclusion that the mere fact of an outright sale "is not in itself sufficient to warrant enforcement" of a due-on clause "in the absence of a showing by the lender that such circumstances exist." (*Ante*, p. 952.)

The lack of citation to authority in support of the majority's conclusion is understandable in view of its purported but inaccurate application of principles enunciated in *Tucker* v. *Lassen Sav. & Loan Assn., supra*, 12 Cal.3d 629. In justification for holding a due-on clause unenforceable on sale of property by installment contract, the unanimous *Tucker* court stated: "Thus in the normal case the vendor, having received a small down payment and retaining legal title, has a considerable interest in maintaining the property until the total proceeds under the contract are received; *in this he differs markedly from the vendor of property where there has been an outright sale.*" (*Tucker* v. *Lassen Sav. & Loan Assn., supra*, 12 Cal.3d 629, 638; italics added.)

The majority opinion errs first in concluding that a due-on clause unreasonably restricts outright sale of property; errs again in concluding there is little or no justification for the clause, contrary to our earlier holdings. We err again in failing to recognize that lenders and borrowers, owners and prospective owners, should be allowed to run their own affairs with minimal governmental intrusion—particularly from this branch.

Appellant's petition for a rehearing was denied September 20, 1978. Bird, C. J., and Mosk, J., were of the opinion that the petition should be granted.

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NEW MEXICO STATUTES 1978

ANNOTATED

Chapter 48: Liens and Mortgages

Pamphlet 71

1980 CUMULATIVE SUPPLEMENT

This supplement includes laws enacted through the Second Regular Session and First Special Session of the Thirty-Third Legislature (1978), First Regular Session of the Thirty-Fourth Legislature (1979) and Second Regular Session of the Thirty-Fourth Legislature (1980) and annotations since the original pamphlet through 604 P.2d 1050, 442 U.S. 1316, 611 F.2d 375, 480 F. Supp. 306, 84 F.R.D. 174 and 1980 Op. Att'y Gen. No. 80-6.

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E. The provisions of this section shall not apply to any person who merely furnishes materials or supplies at the site.

History: 1978 Comp., § 48-2-18, enacted by Laws 1979, ch. 168, § 3.

Effective date. — Laws 1979, ch. 168, § 5, makes the act effective on January 1, 1980.

48-2-19. Failure to discharge valid lien.

Any contractor, subcontractor or material supplier who, having been paid for the performance of his obligations under any contract relating to the improvement of real property, fails to obtain, within ninety days after the date a valid lien is filed against real property by a party who supplied him with services or materials on the job, a discharge of such lien, in the absence of a bona fide dispute with such party concerning the amount due and owing such party on the project, shall constitute willful and malicious injury to another or to the property of another.

History: 1978 Comp., § 48-2-19, enacted by Laws 1979, ch. 168, § 4.

Effective date. — Laws 1979, ch. 168, § 5, makes the act effective on January 1, 1980.

ARTICLE 3

Liens on Personal Property

48-3-5. [Landlords' liens.]

Am. Jur. 2d, A.L.R. and C.J.S. references. Application of statutory landlord's lien to property of third person used by tenant on rented premises, 95 A.L.R.3d 1205.

ARTICLE 7

Mortgages

Sec.
48-7-11. Purpose.
48-7-12. Unenforceable provisions.
48-7-13. Security; safeguard.
48-7-14. Mortgage transfer fee or assumption fee.

48-7-9. Mortgages; future advances; lien.

Recording statutes provide notice and indicate limits of financing. — In lending money secured by property, recording statutes provide for notice to other potential lenders and indicate the upper limits of that financing. New Mexico Bank & Trust Co. v. Lucas Bros., 92 N.M. 2, 582 P.2d 379 (1978).

Certainty of extent to which mortgage encumbers property required. — Because potential lenders rely upon recorded mortgages to determine whether to make other loans, there must be certainty as to the extent to which a mortgage encumbers property. New Mexico Bank & Trust Co. v. Lucas Bros., 92 N.M. 2, 582 P.2d 379 (1978).

48-7-11. Purpose.

The legislature finds that clauses in mortgages and deeds of trust by way of mortgage of real estate on residential property consisting of not more than four housing units, which:

A. allow the mortgagee or similar party to accelerate payments upon a transfer of the property by the mortgagor may constitute an unreasonable restraint upon alienation, to the detriment of the public welfare; and

B. allow the mortgagee or similar party to increase the interest thereon if the property is transferred may constitute an unreasonable restraint upon alienation to the detriment of the public welfare.

History: Laws 1979, ch. 45, § 1.

1311

48-7-12. Unenforceable provisions.

A. A provision in a mortgage instrument or a deed of trust by way of mortgage of real estate, securing an interest in residential property consisting of not more than four housing units, which permits:

(1) an acceleration of the payment of an indebtedness due in the event of a transfer of all or any part of the mortgagor's interest to another party by any means is unenforceable unless the security interest is substantially impaired; or

(2) an increase in the rate of interest on the indebtedness in the event of the transfer of all or any part of the mortgagor's interest to another party by any means is unenforceable unless the security interest is substantially impaired.

B. The provisions of this section shall not apply to a mortgage entered into between a bona fide employer as mortgagee and an employee and the employee's spouse if he is married.

History: Laws 1979, ch. 45, § 2.

A.L.R.3d reference. — Validity, construction, and application of provisions entitling mortgagee to increase interest rate on transfer of mortgaged property, 92 A.L.R.3d 822.

48-7-13. Security; safeguard.

Any creditor or mortgagee who feels the security interest is endangered by the transfer of the real estate to another party may proceed by foreclosure; provided that the creditor or mortgagee shall, as a condition to such foreclosure, prove that the security interest in the property would be substantially impaired.

History: Laws 1979, ch. 45, § 3.

48-7-14. Mortgage transfer fee or assumption fee.

Nothing in this act [48-7-11 to 48-7-14 NMSA 1978] shall prevent a mortgagee or creditor from charging a fee to transfer a mortgage or deed of trust by way of mortgage of real estate from one party to another; provided that such fee is reasonable and in no event exceeds one-half of one percent of the unpaid principle balance of the mortgage or deed of trust at the time of the transfer.

History: Laws 1979, ch. 45, § 4.

Emergency clause. — Laws 1979, ch. 45, § 6, makes the act effective immediately. Approved March 15, 1979.

Separability clause. — Laws 1979, ch. 45, § 5, provides for the severability of the act if any part or application thereof is held invalid.

CODE OF GEORGIA ANNOTATED

1980
Cumulative Pocket Part

Prepared by
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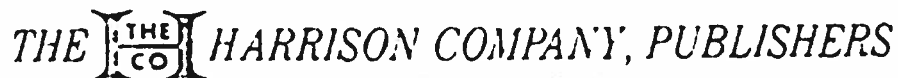
BOOK 20 — 1967 Revision
Title 67 —Mortgages, Conveyances to Secure Debt, and Liens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1313

In all cases, any servicing agent or any person or entity to whom the indebtedness is paid on behalf of any grantee, shall be responsible for notifying the holder thereof upon payment in full, and securing the satisfaction or cancellation as hereinabove provided, and upon failure to do so, the servicing agent or payee shall be subject to the same liability as hereinabove provided.

(Acts 1975, p. 1134.)

CHAPTER 67-30. REAL ESTATE TRANSACTIONS INVOLVING SECURITY INTERESTS; PROHIBITED PRACTICES

Sec.
67-3001 Definitions
67-3002 Unreasonable restraint on the alienation of property; prohibited practices

67-3001 Definitions

As used in this Chapter the following terms shall have the following meanings:

(a) "Borrower" means a person who has secured an indebtedness with a security interest in real property, or a person who has taken an interest in real property subject to an outstanding security interest in real property and has notified the holder of the said security interest that he has taken said real property and assumed the indebtedness secured by said real property;

(b) "Lender" means a person who has a security interest in real property evidenced by a security deed, mortgage, trust deed, bond for title or other security document granting a security interest in real property to secure an indebtedness owed to lender;

(c) "Person" means any individual, firm, partnership, corporation, joint venture, association, company, agency, syndicate, estate, trust, business trust, receiver, fiduciary, or other group or combination or any other entity whatsoever.

(Acts 1979, p. 345, eff. March 1, 1979.)

67-3002 Unreasonable restraint on the alienation of property; prohibited practices

(a) Subject to the limitations and exceptions as provided in this Chapter, any lender with a security interest in real estate shall not, directly or indirectly:

(1) Accelerate or mature the indebtedness secured by such real estate on account of the sale or transfer of such real estate or on account of the assumption of such indebtedness. This paragraph (1) shall not apply if the person to whom the real estate would be sold or transferred does not intend to occupy the property as the person's principal residence, if such occupancy is a requirement imposed by Federal regulatory authorities upon the lender.

(2) Increase the interest rate above the existing interest rate of the indebtedness unless: (A) the borrower who is primarily liable for

repayment of the indebtedness shall request in writing to the lender at the time of the making of the application to the lender for approval of the transfer or at any time prior to the granting or denying of approval of said transfer by lender that borrower desires to be relieved of liability under the terms of the security instrument and the note secured thereby, and (B) the lender furnishes written evidence to said borrower that said borrower has been relieved of liability under the terms of the security instrument and the note secured thereby. Upon submission of proper proof, the clerk of the superior court in the county where the security instrument is recorded shall enter a notation on the recorded security instrument to the effect that the borrower has been relieved of liability under the terms of the security instrument and the note secured thereby. In the event the lender so relieves the borrower of liability after having been requested to do so by the borrower, the lender may increase the interest rate on the indebtedness: Provided, however, lender shall not escalate interest in excess of one per cent. per annum above the existing interest rate at the time of the transfer nor shall lender be entitled to escalate the interest rate at any time other than transfer of title and then not more often than once in any 24-month period. Any subsequent transfer of such property after 24 months from the time of the last escalation of interest shall likewise be limited to a one per cent. per annum increase above the interest rate of the indebtedness existing at the time of such subsequent transfer.

(3) Charge, collect, or attempt to collect any fee on account of the sale or transfer of such real estate or on account of the assumption of such indebtedness in excess of (A) one-half of one per cent of the principal amount of the indebtedness outstanding on the date of such transfer or $150, whichever amount is less, in the event the lender does not escalate the interest rate and does not relieve the borrower of liability for the repayment of the indebtedness, or (B) one per cent. of the principal amount of the indebtedness outstanding on the date of such transfer in the event the lender does not escalate the interest rate but does relieve the borrower of liability for the repayment of the indebtedness, or (C) one-half of one per cent. of the principal amount of the indebtedness outstanding on the date of such transfer in the event the lender escalates the interest rate and relieves the borrower of liability for the repayment of the indebtedness.

(4) Enforce or attempt to enforce the provisions of any mortgage, deed of trust or other real estate security instrument executed on or after July 1, 1979, which provisions are contrary to this Chapter.

(5) Withhold approval or disapproval of the sale or transfer of such real estate and the assumption of the indebtedness beyond 45 days after receipt of the written application for same, otherwise the sale or transfer and the assumption shall be approved.

(6) Disapprove the sale or transfer of such real estate and the assumption of the indebtedness for any reason other than the credit worthiness of the person to whom the real estate would be sold or transferred, based upon standards normally used by persons in the business of making loans on real estate in the same or similar circumstances, otherwise any due-on-sale clause or similar provision in the

security instrument shall be deemed to be against public policy and void. This paragraph shall not apply in those instances in which the borrower has not requested to be relieved from liability for the indebtedness.

(b) The maximum increase allowed in subsection (a)(2) of this section and the maximum fee allowed in subsection (a)(3) of this section shall not be deemed required, minimum or ordinary, but said interest increase and fee may, in any case, be less than the amount allowed.

(c) This Chapter shall be applicable only to a security interest in real property utilized as residential dwelling units other than apartments, motels, hotels and nursing homes, and only if the original amount of the loan is less than $100,000.

(d) This Chapter shall not be applicable in those cases in which the Secretary of the Department of Housing and Urban Development, or his successor, matures the indebtedness on multiple-family housing projects pursuant to the current law and regulations of the Federal Housing Administration.

(e) This Chapter shall not be applicable to a person with security interest in real estate who is not regularly engaged in the business of making real estate loans.

(f) In the event that the party assuming the indebtedness declines to agree to an increase in the interest rate as provided in subsection (a)(2) of this section, said indebtedness may be prepaid without penalty or increased interest at any time within 60 days after said assumption; but if the party does not make such prepayment within the 60-day period, the party shall be liable for the increased interest rate from the date of the assumption, and any prepayment penalty provided for in the security instrument shall thereafter be in effect.

(g) Nothing contained in this Chapter shall be construed so as to permit a lender to increase the interest rate beyond applicable usury statutes.

(h) Nothing in this Chapter shall be construed to limit the right of the Federal Land Bank to increase or decrease the interest rate of any loan so long as such increase or decrease is pursuant to the terms of the variable interest rate provision of the security instrument or the note secured thereby and such increase or decrease is not the result of the transfer of the property serving the loan.

(i) This Chapter shall not be applicable to loans made by the Farmers Home Administration which provide for interest subsidies or variable interest rates based on the income of the borrower.

(j) This Chapter shall not be applicable to loans on or secured by real property utilized as residential dwelling units (as that term is used in subsection (c) of this section) made by an employer to an employee as an employment benefit.

(Acts 1979, p. 345; 1980, p. 585, eff. March 20, 1980.)

Editorial Note

Acts 1980, p. 585, added subsection (j)

1316

535.5 Penalty for usury

Law Review Commentaries

Absolute conveyance as a mortgage. Douglas Rendleman, May 1969, 18 Drake Law Review 197.

Bills and notes—defense of usury denied accommodation indorser of corporate note. Summer 1957, 42 Iowa Law Review 601.

Contracts in Iowa revisited, illegality. Richard S. Hudson, Dec. 1958, 8 Drake Law Review 3.

Iowa usury statute and sales on credit. May 1952, 1 Drake Law Review 62.

2. Construction and application

Iowa usury law covers the element of "forbearance for a debt." State ex rel. Turner v. Younker Bros., Inc., 1973, 210 N.W.2d 550.

It is within the legislature's power to apply the usury statutes, to credit sales, thereby negating the time-price doctrine. Id.

5. Remedies in general

Since no right of recovery existed for "usurious interest" paid by customers, there was in department store's possession no fund on which a constructive trust could be imposed and there was therefore no "specific property" upon which to base a "hybrid" class action; nor was the State and its Attorney General entitled to bring a "true" or a "spurious" class action. State ex rel. Turner v. Younker Bros., Inc., 1973, 210 N.W.2d 550.

8. Persons liable for penalties

Where defendant department store had about 165,000 active revolving charge accounts and about 2,500 active installment accounts, and where revolving charge accounts had been used since 1963 and retail installment contracts for a number of years, the store's usurious practices under those two credit plans were open, public, repeated, continuous, persistent and intentional and therefore constituted a public nuisance. State ex rel. Turner v. Younker Bros., Inc., 1973, 210 N.W.2d 550.

Only intent of creditor necessary to make a transaction usurious is one to exact payment in excess of the amount of interest allowed by law; in the instant case, regardless of the fact that defendant department store may have believed it had the legal right to require finance charges in excess of the nine percent permitted by § 535.2, the requisite usurious intent existed where the store had the definite intent of charging or accepting a "finance charge" on both types of its credit transactions in excess of the statutorily permitted nine percent. Id.

12. Defense, usury as

Defense of usury is personal to the borrower. Peterson v. Modleska, 1964, 256 Iowa 152, 125 N.W.2d 751.

15. Actions in general

Attorney General had the authority to institute against retail department store an action seeking damages, declaratory judgment and injunctive relief for alleged violations of the Iowa usury statutes, § 535.1 et seq. State ex rel. Turner v. Younker Bros., Inc., 1973, 210 N.W.2d 550.

535.6 Interest in excess of two percent per month

Every person or persons, company, corporation, or firm, and every agent of any person, persons, company, corporation, or firm, who shall take or receive, or agree to take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forebearance or use of money in the sum or amount of more than five hundred dollars a rate greater than two percent per month, shall be deemed guilty of a serious misdemeanor. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law. Provided, however, this section shall not apply to lawful loans under chapter 536.

Amended by Acts 1959 (58 G.A.) ch. 339, § 1; Acts 1965 (61 G.A.) ch. 409, § 1; Acts 1976 (66 G.A.) ch. 1245 (ch. 4), § 458, eff. Jan. 1, 1978.

1976 Amendment: Added "serious" misdemeanor and deleted specified punishment.

Cross References

Consumer frauds, see § 714.16.

Library references

Usury ⟹119(1).
C.J.S. Usury § 160.

535.8 Loan charges limited

1. As used in this section, the term "loan" means a loan of money which is wholly or in part to be used for the purpose of purchasing real property which is a single-family or a two-family dwelling occupied or to be occupied by the borrower. "Loan" includes the refinancing of a contract of sale, and the refinancing of a prior loan, whether or not the borrower also was the borrower under the prior loan, and the assumption of a prior loan.

2. a. A lender may collect in connection with a loan a loan processing fee which does not exceed one percent of an amount which is equal to the loan principal less twelve thousand five hundred dollars, except that in the event of an assumption of a prior loan the lender may collect a loan processing fee which does not exceed an amount which is a reasonable estimate of the expense of processing the loan assumption but which does not exceed one percent of the amount assumed. A loan processing fee collected under the authority of this paragraph is compensation to the lender solely for the use

1317

of money, notwithstanding any provision of the agreement to the contrary. However, a loan processing fee collected under the authority of this paragraph shall be disregarded for purposes of determining the maximum charge permitted by section 535.2, or section 535.3, subsection 2. The collection in connection with a loan of a loan origination fee, closing fee, commitment fee or similar charge other than as expressly authorized by this paragraph is prohibited.

b. A lender may collect in connection with a loan any of the following costs which are incurred by the lender in connection with the loan and which are disclosed to the borrower:

(1) Credit reports.

(2) Appraisal fees paid to a third party, or when the appraisal is performed by the lender, a fee which is a reasonable estimate of the expense incurred by the lender in performing the appraisal.

(3) Attorney's opinions.

(4) Abstracting fees paid to a third party; or when the abstracting is performed by the lender, a fee which is a reasonable estimate of the expense incurred by the lender in performing the abstracting.

(5) County recorder's fees.

(6) Inspection fees.

(7) Mortgage guarantee insurance charge.

(8) Surveying of property.

(9) Termite inspection.

The lender shall not charge the borrower for the cost of revenue stamps or real estate commissions which are paid by the seller. Collection of any cost other than as expressly permitted by this paragraph is prohibited.

c. If the purpose of the loan is to enable the borrower to purchase a single-family or two-family dwelling, for his or her residence, any provision of a loan agreement which prohibits the borrower from transferring his or her interest in the property to a third party for use by the third party as his or her residence, or any provision which requires or permits the lender to make a change in the interest rate, the repayment schedule or the term of the loan as a result of a transfer by the borrower of his or her interest in the property to a third party for use by the third party as his or her residence shall not be enforceable except as provided in the following sentence. If the lender on reasonable grounds believes that its security interest or the likelihood of repayment is impaired, based solely on criteria which is not more restrictive than that used to evaluate a new mortgage loan application, the lender may accelerate the loan, or to offset any such impairment, may adjust the interest rate, the repayment schedule or the term of the loan. A provision of a loan agreement which violates this paragraph is void.

d. If a lender collects a fee or charge which is prohibited by paragraph "a" or "b" of this subsection or which exceeds the amount permitted by paragraph "a" or "b" of this subsection, the borrower has the right to recover the unlawful fee or charge or the unlawful portion of the fee or charge, plus attorney fees and costs incurred in any action necessary to effect recovery.

3. A lender shall not, as a condition of making a loan as defined in this section, require the borrower to place money, or to place property other than that which is given as security for the loan, on deposit with or in the possession or control of the lender or some other person if the effect is to increase the yield to the lender with respect to that loan; provided that this subsection shall not prohibit a lender from requiring the borrower to deposit money without interest with the lender in an escrow account for the payment of insurance premiums, property taxes and special assessments payable by the borrower to third persons. Any lender who requires an escrow account shall not violate the provisions of paragraph a of subsection 1 of section 507B.5.

4. If any lender receives interest either in a manner or in an amount which is prohibited by subsection 3 of this section, the borrower shall have the right to recover all amounts collected or earned by the lender, whether or not from the borrower, in violation of this section, plus attorney fees, plus court costs incurred in any action necessary to effect such recovery.

5. The provisions of this section shall not apply to any loan which is subject to the provisions of section 682.46, nor shall it apply to origination fees, administrative fees, commitment fees or similar charges paid by one lender to another lender if these fees are not ultimately paid either directly or indirectly by the borrower who occupies or will occupy the dwelling or by the seller of the dwelling.

A lender shall not collect any fee from a real estate agent for the purpose of reserving or committing funds held or to be held by the lender for loans which are subject to this section. If a lender collects a fee which is prohibited by this paragraph the borrower has the right to recover the unlawful fee, plus attorney fees and costs incurred in an action necessary to effect recovery.

A lender shall not use an appraisal for any purpose in connection with making a loan under this section if the appraisal is performed by a person who is employed by or affiliated with any person receiving a commission or fee from the seller of the property. If a lender violates this paragraph the borrower is entitled to recover any actual damages plus the costs paid by the borrower, plus attorney fees incurred in an action necessary to effect recovery.

Added by Acts 1978 (67 G.A.) ch. 1190, § 12, eff. Aug. 3, 1978. Amended by Acts 1979 (68 G.A.) ch. 130, §§ 21, 31, eff. April 13, 1979; Acts 1979 (68 G.A.) ch. 130, §§ 20, 22, eff. July 1, 1979; Acts 1979 (68 G.A.) ch. 132, § 16.

Acts 1979 (68 G.A.) ch. 130, § 20 provides as follows: "Acts of the Sixty-seventh General Assembly, 1978 Session, chapter one thousand one hundred ninety (1190), section twelve (12), is reenacted except as provided in section twenty-one (21) of this Act and is the law of this state on and after the effective date of this Act, notwithstanding any contrary provision of Acts of the Sixty-seventh General Assembly, 1978 Session, chapter one thousand one hundred ninety (1190)."

Acts 1979 (68 G.A.) ch. 130, § 29, eff. April 13, 1979, provided: "The maximum lawful rate of interest as established under Acts of the Sixty-seventh General Assembly, 1978 Session, chapter one thousand one hundred ninety (1190), section twelve (12), and in effect on the effective date of this Act as provided in that section, shall, notwithstanding contrary provisions of that section or that Act, be the maximum lawful rate until the maximum lawful rate for the first full calendar month which commences on or after the effective date of this Act is determined and published and takes effect as provided in section nineteen (19) of this Act."

Acts 1979 (68 G.A.) ch. 130, § 31, eff. April 13, 1979, provided: "It is the intent of this Act that Acts of the Sixty-seventh General Assembly, one thousand one hundred ninety (1190), sections eleven (11) through seventeen (17), and sections nineteen (19) and twenty-two (22), which were enacted as temporary provisions to expire on July 1, 1979, shall be deemed permanent Iowa law as enacted, notwithstanding the temporary nature of those provisions when enacted, and that the laws of this state as contained in those provisions shall continue to be the laws of this state on and after the effective date of this Act, except as specifically amended by a provision of this Act, as if those provisions had been enacted as permanent Iowa law."

Acts 1978 (67 G.A.) ch. 1190, § 20, provided: "It is the intent of the general assembly in enacting this Act that the provisions of this Act except sections one (1) through ten (10) of this Act and except subsection two (2) of section five hundred thirty-five point two (535.2) of the Code as amended by section eleven (11) of this Act and except paragraphs b and c of subsection three (3) of section five hundred thirty-five point two (535.2) of the Code as amended by section eleven (11) of this Act and except sections eighteen (18) and twenty-one (21) of this Act shall have temporary effect only, and that the laws of this state as they existed prior to amendment by the provisions of this Act other than the provisions contained in sections one (1) through ten (10), and in subsection two (2) of section five hundred thirty-five point two (535.2) of the Code as amended by section eleven (11), and in paragraphs b and c of subsection three (3) of section five hundred thirty-five point two (535.2) of the Code as amended by section eleven (11), and in sections eighteen (18) and twenty-one (21) of this Act, shall be the laws of this state on and after July 1, 1979."

1979 Amendments: Acts 1979 (68 G.A.) ch. 130, § 21, effective April 13, 1979, repealed subsection 6 which provided as follows: "6. This section is repealed effective July 1, 1979."; section 22, effective July 1, 1979, amended subsections 1, 2 and 5, which formerly provided as follows:

"1. As used in this section, the term 'loan' means any money loaned to a borrower who furnishes, as security for all or part of the loan, a mortgage on real property which is a single-family or a two-family dwelling occupied or to be occupied by the borrower.

"2. The assessment and collection in connection with a loan of a loan origination fee, closing fee, commitment fee or similar charge is prohibited. If any lender receives any amount as a loan origination fee, closing fee, commitment fee or similar charge, or any combination thereof, which exceeds the amount permitted by this section, the borrower shall have the right to recover that charge, plus attorney fees and court costs incurred in any action necessary to effect such recovery.

"Any costs charged to a borrower, associated with a loan, shall not exceed actual costs which shall be disclosed to the borrower. Such costs may only include one or more of the following:

"a. Credit reports.
"b. Appraisal fees.
"c. Attorney's opinions.
"d. Abstracting.
"e. County recorder's fees.
"f. Inspection fees.
"g. Mortgage guarantee insurance charge.
"h. Surveying of property.
"i. Termite inspection.

1319

IOWA CODE ANNOTATED

Official Classification

Volume 32

Sections 535 to 540

Cumulative Annual Pocket Part

For Use In 1980-1981

Replacing prior pocket part in back of volume

Includes laws through the
1979 Regular Session

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1320

West's
ANNOTATED CALIFORNIA CODES

CIVIL CODE
Sections 2395 to 3273

Volume 11

Cumulative Pocket Part

For Use In 1980

Replacing prior Pocket Part in back of volume

Includes laws through the 1979 portion of the 1979–1980 Regular Session

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1321

§ 2924.5 Acceleration clause in deed of trust or mortgage on property containing four or fewer residential units

Law Review Commentaries

Consumerism reaches the sacrosanct trust deed. (1977) 52 S.Bar J. 203.

Demise of the due-on-sale clause. (1976) 64 C.L.R. 573.

Due on sale and due on encumbrance clauses. (1974) 7 Loyola L.Rev. 306.

Legislative review. (1973) 4 Pacific L.J. 568.

Tolling acceleration clauses. (1973) 9 C.W.L.R. 514.

1. In general

Purpose of § 711 providing that no clause in deed of trust or mortgage on property containing four or fewer residential units which provides for acceleration of due date upon alienation shall be valid unless the clause is set forth both in the body of the deed of the trust or mortgage and the promissory note is to provide notice to the borrower; and inclusion of due-on clause in the promissory note as required by § 711 does not make the clause necessarily enforceable. Wellenkamp v. Bank of America (1978) 148 Cal.Rptr. 379, 582 P.2d 970, 21 C.3d 943.

Where proposed resale, although not technically an installment sale, bore all essential elements of such a sale in that terms of sale did not give purchasers an amount down sufficient to retire vendors' note and deed of trust, where original purchaser remained liable on original trust deed note, where land involved was raw desert land, so that any fear of "waste" on part of new purchasers hardly could exist, where terms of sale left original purchasers with substantial interest in property involved, attempt by vendors to enforce the "due on sale" acceleration clauses in their deeds of trust was illegal and improper. Demey v. Joujon-Roche (App.1976) 133 Cal.Rptr. 570.

§ 2924.6 Acceleration clauses; inapplicability to certain transfers; prohibition of waiver; date of application

(a) An obligee may not accelerate the maturity date of the principal and accrued interest on any loan secured by a mortgage or deed of trust on residential real property solely by reason of any one or more of the following transfers in the title to the real property:

(1) A transfer resulting from the death of an obligor where the transfer is to the spouse who is also an obligor.

(2) A transfer by an obligor where the spouse becomes a coowner of the property.

(3) A transfer resulting from a decree of dissolution of the marriage or legal separation or from a property settlement agreement incidental to such a decree which requires the obligor to continue to make the loan payments by which a spouse who is an obligor becomes the sole owner of the property.

(4) A transfer by an obligor or obligors into an inter vivos trust in which the obligor or obligors are beneficiaries.

(5) Such real property or any portion thereof is made subject to a junior encumbrance or lien.

(b) Any waiver of the provisions of this section by an obligor is void and unenforceable and is contrary to public policy.

(c) For the purposes of this section, "residential real property" means any real property which contains at least one but not more than four housing units.

(d) This act applies only to loans executed or refinanced on or after January 1, 1976.

(Added by Stats.1975, c. 850, p. 1916, § 1.)

Section 2 of Stats.1975, c. 850, p. 1916, provides:

"This act is not intended to affect the application of any other provision or principle of law to any type of acceleration provision other than those specifically described in this act."

Library References

Mortgages ⟹401.
C.J.S. Mortgages § 495(2).
Words and Phrases (Perm.Ed.)

§ 2925. Transfer subject to defeasance on a condition; proof

Law Review Commentaries

Sale and leaseback financing of real estate as mortgages. James A. Moewe (1973) 48 S.Bar J. 554.

§ 2927. Possession of mortgaged property

4. Rights of mortgagor in possession—Generally

Where equitable mortgage was established, mortgagee could not maintain action for ejectment and mortgagor could defend against an action for possession without paying or offering to pay the debt and mortgagee's only remedy would be an action to foreclose. Aguilar v. Bocci (1974) 114 Cal.Rptr. 91, 39 C.A.3d 475.

Asterisks * * * indicate deletions by amendment

1322

D

EXHIBIT D

NEVADA MORTGAGE BANKERS ASSOCIATION

April 3, 1981

Honorable Senator:

Re: SB 400

This letter is our request that the above bill be killed in your committee without letting it come to the floor for vote. This is very bad legislation for Nevada as it will cause major problems in enabling Home Buyers to obtain suitable financing.

1. The Federal National Mortgage Association (FNMA) will immediately impose a program which provides for a 30 year loan with a seven (7) year call or less. Information from FNMA's Sellers Guide is submitted herewith.
2. Other institutional investors will follow with various versions of this call option.
3. With reduced viability of FHA and VA, the need for Conventional Financing is going to become more necessary. We don't need this type of legislation that will tend to "scare off" investors.

One of the main arguments we hear from proponents of the bill is "The lender made a 30 year loan originally - what difference does it make if it is sold?" True, the loan was made for 30 years, but the acceleration and alienation clauses were put in for the precise purpose they now serve. No one knew a few years ago that our inflationary society would reach the extremes it has, and I don't think we know today where it is going. The lenders make loans based on what they consider Average Life of the loan. In the past this has been computed as 12 years. Some loans are paid off much sooner and others may occasionally run to maturity. The loans that are on property owned by the original owner have not been subject to change in original terms until the advent of variable and renegotiable rate loans.

We do not need any further road blocks to being able to do business in a way that satisfies the investor who is highly needed to support housing demands in Nevada. The demise of SB 400 is a step in the right direction.

Very truly yours,

Don Brodeen, Chairman, Legislative Committee
Nevada Mortgage Bankers Association and
Southern Nevada Mortgage Bankers Association

IV. When, in the opinion of FNMA, FNMA may not be able to fully enforce the acceleration-upon-sale provision, FNMA requires the Call Option Rider for the Mortgage/Deed of Trust and modification of the Note, as described in Section 301.02 of this Supplement. In the above lists, the jurisdictions where FNMA requires the Call Option Rider are indicated by (#). The date following (#) is the date on which the requirement for the Call Option Rider is effective. For example, (#11/10/80) indicates that the Call Option Rider is required on mortgages delivered under commitments issued on and after November 10, 1980. This requirement for the Call Option Rider will not apply to mortgages originated and sold to FNMA by federally-chartered savings and loan associations. *

The instructions for preparing the Call Option Rider and modifying the Note (except for New York properties which require special instructions furnished by the Northeastern Regional Office) are as follows: * *

1 to 4 Family Note

Insert the language, shown as Exhibit I to this Appendix, on either the front or the reverse side of the Note.

If the language shown as Exhibit I is typed on the reverse of the Note, insert the following sentence on the front side of the Note, above the area where the borrower(s) will place their signature(s):

"See reverse side of this Note for provision concerning option to call."

Security Instrument (Mortgage, Deed of Trust, Deed)

Insert the following provision, or equivalent incorporation clause, in the security instrument as a new covenant or in the property description area or any other place above the borrower(s) signature(s):

"The Call Option Rider attached hereto and executed of even date herewith is incorporated herein and the covenants and agreements of the Rider shall amend and supplement the covenants and agreements of this (Mortgage, Deed of Trust, Deed) as if the Rider were a part hereof."

The Call Option Rider, shown as Exhibit II to this Appendix, must be executed by the borrower(s) and attached to the security instrument.

V. When using any multifamily form specified above, the blanks (for the original principal amount and the optional future advances) in the Future Advance Provision must be completed. Where a dollar amount of optional future advances is required, the dollar amount to be inserted is $100,000. * * * *

CALL OPTION RIDER

THIS RIDER is made this ....day of ....
19 ......, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Deed to Secure Debt (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to ....
.... (the "Lender") of the same date (the "Note") and covering the property described in the Security Instrument and located at:

....
(Property Address)

ADDITIONAL COVENANT. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. Lender's Call Option. During the thirty day period beginning on a date seven years from the date of the Note, Lender shall have the option to require payment in full of the sums secured by the Security Instrument. If Lender elects to exercise this call option, notice of such election shall be given to Borrower who shall pay all such sums to Lender on the payment date specified in the notice, which date shall be at least 60 days from the date of mailing. If Borrower fails to pay such sums when due, Lender may invoke any remedies permitted by the Security Instrument.

IN WITNESS WHEREOF, Borrower has executed this Call Option Rider.

_______________________________ —Borrower

_______________________________ —Borrower

9/80

Conventional mortgages secured by properties located in the following jurisdictions must have call option provisions in order to be eligible for delivery under commitments issued on and after January 19, 1981:

Arkansas
Florida
Mississippi
New York
Ohio
Oklahoma

The states listed above are in addition to those states where FNMA previously announced it would require call option provisions for mortgages delivered under commitments issued on and after November 10, 1980. Those states are as follows:

Arizona
California
Colorado
Georgia
Illinois
Iowa
Michigan
Minnesota
New Mexico
South Carolina
Washington

* Federal savings and loan associations will continue to be exempt from these call option requirements.

* There is only one (1) in Nevada.

LETS NOT ADD NEVADA TO THIS LIST.

LV Homes Eligible For Refinancing

By LEW SICHELMAN
Real Estate Editor
The Washington Star

WASHINGTON, D.C. — Owners and buyers of nearly 19,000 homes in the Las Vegas area are eligible for financing at interest rates under a new program by the nation's largest supplier of funds for residential mortgages.

The Federal National Mortgage Association is offering to refinance many of the 1.9 million mortgages it owns nationwide — including the 26,201 it owns in Nevada — thereby allowing home owners to convert their equity to cash or provide their buyers with more affordable financing.

The program also will enable Fannie Mae, as the federally-chartered but privately managed corporation is known, to bolster its declining portfolio and improve its earnings. Presently, FNMA's cost of borrowing funds exceeds its return on the mortgages it owns.

The program enables consumers to obtain new financing at a favorable interest rate by liquidating their old, below-market mortgages. In turn, Fannie Mae will obtain a higher yield on the new mortgages.

Any credit-worthy home owner whose mortgage is now owned by FNMA or any credit-worthy buyer of a house on which FNMA currently owns the mortgage is eligible. To determine eligibility owners should contact the lender collecting their monthly payments.

A qualified owner may be able to trade in his present loan for a new one in an amount up to 90 percent of the current value of his house — up to a maximum of $98,500.

A qualified buyer is eligible for financing of up to 90 percent of value up to the same limit if FNMA owns the mortgage on the seller's house.

If the house is owned or purchased by an investor who does not occupy it, the new mortgage can be for up to 80 percent of value.

The loan being traded in can be government-backed or conventional, but the new loan will be a conventional one. The new loan can be made by any of the 2,000 lenders approved to sell FNMA conventional loans.

The interest rate on the new loan will be determined individually, but it "will almost always be made at an interest rate well below prevailing rates," said FNMA president David O. Maxwell.

It will be based on the unpaid balance of the old one, its interest rate and the number of years remaining plus the amount and terms of the new mortgage. The new rate could vary from lender to lender, as could the fees individual lenders charge.

Maxwell said the rates FNMA offers will be competitive with wrap-around mortgage rates offered by other lenders as well as the effective rate of an existing first mortgage and a new second mortgage.

For example, if a home owner has a 9.5 percent mortgage owned by FNMA with an unpaid balance of $50,000, and if the house is now worth $85,000, he could refinance the mortgage with a new loan of $70,000 at an interest rate of 10.875 percent.

The monthly payment on the new loan would be $600 — as opposed to $379 under the old loan. But it's well below the $885 payment on a new 15 percent mortgage, or the combined $730 payment of the old loan and a 10-year second trust at 18 percent.

There are no restrictions on the use of the new funds. The borrower can use it to send his children to college, pay bills or finance a home improvement.

The availability of below-market financing can also be a helpful sales tool. If, for example, the seller has an old 7.5 percent FNMA-owned loan with a balance of $22,285, the buyer could get a new FNMA mortgage of

(See FANNIE, Page 2D)

Fannie Mae Sets Refinancing Plan

(Continued From Page 1D)

$50,000 at 12.6 percent and put only $2,650 down.

The buyer's monthly payment would be $528 — $95 less than it would be with a new 15 percent loan and $127 better than it would be had he assumed the seller's loan and taken out a 10-year, 18 percent second trust for the remainder of the $50,000 loan.

The resale portion of the program was announced last November. But the interest rate formula was pegged to an index that went so high that there have been few takers. The new formula will rectify that, Maxwell said.

The FNMA executive said the program is designed to offer a consumer-oriented alternative to creative financing, including wrap-around mortgages from other lenders.

A wrap-around is a technique now being used to circumvent high interest rates. A new loan is combined with an existing low-rate mortgage.

The lender charges a rate somewhere between the higher rate of the new funds and the low rate of the original mortgage. He collects a single payment, keeping the amount due on the new loan and forwarding the amount due on the old loan to the original lender.

While the new lender gets something close to a market rate of return for his portion of the loan, the original lender is locked into his below-market return on investment for longer than he otherwise expected.

In effect, the new lender assumes the old loan and, next to the poor housing market, it is assumptions that are killing FNMA.

Nearly 87 percent of the loans on the corporation's books are at interest rates below 10 percent, and two-thirds of its portfolio is assumable. In addition, the average life of a FNMA-owned loan, said Maxwell, "is much longer than it used to be."

The result has been a decline in loan repayments — from $2.6 billion in 1978 to $2.3 billion in 1979 and $1.1 billion last year.

During the same period, FNMA's portfolio grew by 67 percent. And as a consequence, it now has a negative spread, paying 10.11 percent for money on which it earns 9.24 percent.

There is "nothing immoral" about wrap-arounds, said FNMA chairman Oakley Hunter, "but if we can do something to avoid them and upgrade our portfolio, it is in our, best interest and the borrowers to do it."

To improve its yield, FNMA, in effect, is wrapping its own mortgages. And to keep others from doing the same, Maxwell said that it will enforce the due-on-sale provision in its conventional mortgages where permitted by law when they are wrapped by other lenders.

All government-backed loans are assumable, however, and 17 states ban the enforcement of due-on-sale clauses.

FNMA also said it will enforce the clause when second mortgages are made by lenders in connection with the sale of a house, but it will not call the loans due if the second trust is taken back by the seller.

Original document is of poor quality

SB 400

EXHIBIT E

REGARDING "DUE ON SALE "CLAUSE

WHEREAS THE RENO BOARD OF REALTORS, LAS VEGAS BOARD OF REALTORS AND THE NEVADA STATE ASSOCIATION OF REALTORS HAVE DECLINED TO SUPPORT THIS BILL.

LET IT BE KNOWN THAT THE ACTION WAS NOT NECESSARILY THE FEELING OF THE MAJORITY OF THE REALTORS.

THE FOLLOWING UNDERSIGNED NEVADA REAL ESTATE LICENSEES ARE IN FAVOR OF THE PASSAGE OF SB 400.

NAME	ADDRESS
[illegible]	230 E. Liberty
[illegible]	[illegible]
Penny Mayer	230 E. Liberty
[illegible]	230 E. Liberty
[illegible]	230 E Liberty
Barbara Meadows	230 E Liberty
[illegible]	[illegible]
[illegible]	[illegible] Reno
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	375 Tenaya Ln Verdi, NV.
[illegible]	[illegible]
[illegible]	PO Box 753 C.C. [illegible]
[illegible]	222 Calif Ave Reno [illegible]

SB 400

REGARDING "DUE ON SALE "CLAUSE

WHEREAS THE RENO BOARD OF REALTORS, LAS VEGAS BOARD OF REALTORS AND THE NEVADA STATE ASSOCIATION OF REALTORS HAVE DECLINED TO SUPPORT THIS BILL,

LET IT BE KNOWN THAT THE ACTION WAS NOT NECESSARILY THE FEELING OF THE MAJORITY OF THE REALTORS.

THE FOLLOWING UNDERSIGNED NEVADA REAL ESTATE LICENSEES ARE IN FAVOR OF THE PASSAGE OF SB 400.

NAME	ADDRESS
John [illegible]	1095 [illegible]

SB 400

REGARDING "DUE ON SALE "CLAUSE

WHEREAS THE RENO BOARD OF REALTORS, LAS VEGAS BOARD OF REALTORS AND THE NEVADA STATE ASSOCIATION OF REALTORS HAVE DECLINED TO SUPPORT THIS BILL.

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THE FOLLOWING UNDERSIGNED NEVADA REAL ESTATE LICENSEES ARE IN FAVOR OF THE PASSAGE OF SB 400.

NAME	ADDRESS
Gordon E. Rader	5305 Goldenrod Dr., Reno
[illegible] Ellison	995 [illegible] St, Reno
[illegible]	PO Box 1050 Sp NV 89431
[illegible]	3440 Bryan St. Reno, NV 89503
[illegible]	1657 [illegible] Cir. Sparks, NV 89431
[illegible]	14455 [illegible] Reno, NV 895[illegible]
[illegible] K. Rader	5305 [illegible], Reno, 895[illegible]

Return to: Larry Miller

SB 400

REGARDING "DUE ON SALE "CLAUSE

WHEREAS THE RENO BOARD OF REALTORS, LAS VEGAS BOARD OF REALTORS AND THE NEVADA STATE ASSOCIATION OF REALTORS HAVE DECLINED TO SUPPORT THIS BILL.

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THE FOLLOWING UNDERSIGNED NEVADA REAL ESTATE LICENSEES ARE IN FAVOR OF THE PASSAGE OF SB 400.

NAME	ADDRESS
[illegible signature]	Arrow Realty 902 So. Wells Reno Nev 89502
Margaret V. Badie	Arrow Realty 902 S. Wells Ave. Reno, Nv. 89502
Peggy Hammon	Arrow Realty, Inc 6505 Fern Reno Nevada 89502

SB 400 **EXHIBIT E**

REGARDING "DUE ON SALE "CLAUSE

WHEREAS THE RENO BOARD OF REALTORS, LAS VEGAS BOARD OF REALTORS AND THE NEVADA STATE ASSOCIATION OF REALTORS HAVE DECLINED TO SUPPORT THIS BILL,

LET IT BE KNOWN THAT THE ACTION WAS NOT NECESSARILY THE FEELING OF THE MAJORITY OF THE REALTORS.

THE FOLLOWING UNDERSIGNED NEVADA REAL ESTATE LICENSEES ARE IN FAVOR OF THE PASSAGE OF SB 400, AMMENDED TO DELETE DATE.

NAME	ADDRESS
[illegible] Miller	330 E Liberty St Reno Nev 89501
John Richards	2750 Plumas #114 Reno Nev. 8950[illegible]
Keith H Peterson	1360 Foothill Rd Reno Nv 89511
[illegible] J. Harris	1390 California Reno Nv 89509
[illegible] W. [illegible]	2308 [illegible] Reno Nev 8950[illegible]
John Wart	2773 Lakeside DR Reno NV 89517
[illegible]	2308 [illegible] Reno NV
Gary B Andersen	2955 Lakeside Reno 89502
James M. Wilke[illegible]	1490 Severn Drive Reno 89503 89509
[illegible] Bodie	~~[illegible]~~ 3551 E Hidden Valley 323-7211
Jan Hunt	330 E. Liberty St. 329-6224
[illegible]	2385 Audubon Way Reno, 89509
[illegible]	545 Walker Ave. Reno 89509

1333

BUSINESS

Friday, April 17, 1981 | Los Angeles Times | CC/Part IV

Wellenkamp Ruling Hurt Consumers as Well as S&Ls, State Official Says

Linda Tsao Yang
Los Angeles Times

By JOHN A. JONES, Times Staff Writer

The California Supreme Court's Wellenkamp decision, which forces state-chartered savings and loans to allow old, low-rate mortages to be assumed by home buyers with no rate increase, has hurt consumers as well as the S&L industry, California Savings & Loan Commissioner Linda Tsao Yang said in an interview Thursday.

She said her office is analyzing a bill that would overturn the 1978 court ruling.

Yang also said she sympathizes with the S&L industry's need for a more flexible kind of mortgage to reflect changing money-market rates, but said this can be achieved without simply rubber-stamping the federal S&Ls' new rules—or converting state-chartered S&Ls to federal charters.

In other S&L industry developments Thursday:

—The California Savings & Loan League said it will ask Congress to approve a new two-year, tax-exempt savings certificate paying yields based on those of municipal bonds, creating a new source of funds for lower-rate home loans.

—Federal Home Loan Bank Board Chairman Richard T. Pratt said in New York that money-market mutual funds, which have attracted billions of dollars that might otherwise have been deposited in savings and loans, "have simply gone around" the financial institutions deregulation process in which Congress sought an orderly phaseout of savings interest-rate ceilings. Pratt, addressing the annual meeting of the Federal Home Loan Bank of New York, also said the FHLBB will consider at its April 23 meeting a new form of adjustable-rate mortgage for federal S&Ls.

The new mortgage rules are widely expected to allow much more flexible responses to changing interest rates than the current one-half percentage point a year or 2½ points over the life of the loan. The bank board indicated last fall that it would consider removing overall limits on rate changes.

The prospect of more flexible loans for federal S&Ls, after the state government's failure to approve anything comparable for state-chartered S&Ls, has led many California associations to consider converting to federal charters. The threat of wholesale conversions was highlighted by Great Western Savings & Loan Assn., Beverly Hills, which earlier this week said it would consider converting because the state had imposed "unacceptable" conditions on its plan to merge with Financial Federation Inc., Los Angeles. Great Western also cited the Wellenkamp decision and the need for a new kind of mortgage.

Great Western said it would start an immediate study of how to convert itself into a federal, and industry spokesmen said other associations were considering similar plans.

Yang said Thursday that "the issue here is not parity (with the federals) but the mechanics of achieving it."

A bill now in the Legislature which would give state S&Ls automatic parity with federal mortgage regulations "does not permit any role whatsoever for the state," she said.

Yang said she could not discuss her exact recommendations to the Brown Administration, but that "my position is guided by the reality that the state-licensed associations must be able to compete effectively, and have mortgages that can be sold in the secondary markets."

As for the Wellenkamp decision, Yang said, "That decision was conceived as a measure to protect consumer interests, but what has happened in the real world in the last couple of years is that many so-called creative financing schemes were actually built on to the ability to wrap around existing mortgages and this led to the heartache of many California home buyers and sellers, as well as investors in [illegible] and trust deeds. It also severely constrained the flow of repayment funds into the coffers of the S&Ls."

She said her office is analyzing A.B. 2158, introduced by Assemblyman Jim Costa (D-Fresno), which would negate the Wellenkamp decision and allow California lenders to call in old loans when a home is sold. Assembly sources said the bill is due for a hearing in that body's Finance Committee next month.

Yang also defended the conditions she attached to the Great Western-Fin Fed merger requiring commitments to lending in low-income and low loan-volume areas. She said Great Western's record in that regard is "impressive" but that its share of such loans had been declining in the last three years relative to the industry average.