The Catholic University of America, Columbus School of Law

CUA Law Scholarship Repository

Scholarly Articles and Other Contributions Faculty Scholarship

1982

Due on Sale Clauses: Profits, Public Policy, and Preemption

Ralph J. Rohner
The Catholic University of America, Columbus School of Law

Follow this and additional works at: https://scholarship.law.edu/scholar

Part of the Contracts Commons

Recommended Citation
Ralph J. Rohner, Due on Sale Clauses: Profits, Public Policy, and Preemption, J. RETAIL BANKING, Mar. 1982, at 1.

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Use of the due-on-sale clause to trigger rate adjustments, a relatively recent innovation, has been the target of state legislation and conflicting court opinions. This article reviews arguments on both sides of the debate surrounding the clause, the issues before the Supreme Court when it addresses due on sale later this year, and the potential repercussions of a High Court decision.

Due-on-Sale Clauses: Profits, Public Policy, and Preemption

RALPH J. ROHNER

On January 25, 1982, the United States Supreme Court agreed to hear a case from California called *Fidelity Federal Savings and Loan Association v. de la Cuesta.*[1] The central issue of this case is whether Federal Home Loan Bank Board regulations that authorize due-on-sale clauses for federal savings and loan associations preempt state laws forbidding the use of such clauses to increase the interest rate. The case therefore promises to bring some measure of resolution to the raging debate over due-on-sale clauses. The case will not be argued until the fall 1982 term, however, and a decision may not emerge from the Court until 1983. While the narrow question before the Court will be the preemptive effect of the Bank Board regulation, the Court's decision will necessarily say a great deal more about the acceptability of due-on-sale clauses as a matter of policy, and about the ability of federal regulatory agencies to authorize federally chartered institutions to engage in practices different from those permitted under state law.

With this case on the horizon, it is worth-

Ralph J. Rohner is professor of law, The Catholic University of America. He was formerly assistant counsel to the Senate Committee on Banking, Housing and Urban Affairs and served as chairman of the Federal Reserve Board's Consumer Advisory Council.

while to review the broader setting in which the due-on-sale debate has arisen, including the possible repercussions of whatever decision the Supreme Court may reach.

Purpose of Due-on-Sale Clauses

The risky practice of "borrowing short and lending long" has characterized America's mortgage lending industry for years. That is, the thrift institutions and banks that provide most of the nation's mortgage credit have drawn the bulk of their lendable funds from relatively short-term deposit accounts. Those funds were then invested in mortgage loans of twenty to thirty years' duration, generally at a fixed rate of return. In a stable financial market it was possible for mortgage lenders to maintain a satisfactory equilibrium between their costs of funds and the yields on their mortgage portfolios. Regulation Q helped maintain an adequate spread for the lenders by artificially deflating the cost of their major source of funds – passbook and comparable accounts.

...the Court's decision will necessarily say a great deal more about the acceptability of due-on-sale clauses as a matter of policy, and about the ability of federal regulatory agencies to authorize federally chartered institutions to engage in practices different from those permitted under state law.

The interest rate volatility of the middle and late 1970s, however, knocked this whole structure askew. Mortgage lenders' cost of funds skyrocketed under the combined pressures of inflation, money market competition, interest on checking, and the phase-out of Regulation Q. Aging portfolios of mortgages returning 10 percent or less could not sustain depositor demands for much higher earnings. The mortgage lending industry by the end of the 1970s found itself caught in a desperate earnings squeeze.

None of this is really news. Nor is it any revelation that the industry has scratched and clawed after every conceivable technique to protect itself from the frozen restrictions of long-term fixed rate mortgages. Usury ceilings for mortgage loans were removed by congressional dictate.[2] Variable rate, adjustable rate, rollover, and graduated payment mortgage forms evolved, with the blessings of the federal regulators.[3] Secondary market investors like the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation began requiring protective devices like call option riders (essentially demand features) in the mortgages they purchased and packaged. Increasingly, mortgage lenders turned to the due-on-sale clause as a mechanism to increase rates on outstanding mortgages.

The due-on-sale clause is essentially an acceleration provision. It stipulates that if the mortgagor sells or encumbers the property without the lender's consent, the entire outstanding balance becomes immediately due and payable. Of course, the lender is happy to consent to the sale if the transferee will agree to adjust the rate to current market levels. The attempted sale or encumbrance of the home thus becomes the occasion for imposing a higher rate on the successor mortgagor.[4] Even though any given mortgage, or a portfolio of mortgages, carries a nominal term of 25 or 30 years, the "half-life" of a mortgage is typically much shorter than that, perhaps seven or eight years on the average before the property is sold. The due-on-sale clause in effect transforms a fixed rate mortgage into an adjustable rate mortgage by allowing the lender to condition a sale on a rate increase. The major difference in fact between the due-on-sale device and a true adjustable rate mortgage is that the time intervals between adjustments are unpredictable with the due-on-sale clause.

Inclusion of the due-on-sale clauses in mortgages is a long-standing practice.[5] Historically, the clause was most often used by the lender to assure the creditworthiness of the transferee or

to guard against possible waste or damage to the property serving as security. Sometimes it was used to trigger assumption or waiver fees. Its use to trigger rate adjustments seems to be a later innovation. For example, FHLMC has included a due-on-sale clause expressly tied to interest rate increases since 1971; FNMA forms have contained comparable language only since 1975.[6] Explicit approval of due-on-sale clauses first appeared in regulations of the Federal Home Loan Bank Board in 1976. Thus, the clause has only recently taken on the dominant function of protecting the lender against rate volatility.

Thus, the clause has only recently taken on the dominant function of protecting the lender against rate volatility.

The problem with this evolving use of due-on-sale is that it runs headlong into the contrary experience and expectations of a generation of American homeowners accustomed to fixed rate, readily assumable mortgages. As actively as lenders sought approval for due-on-sale and other rate-sensitive mortgage mechanisms, just as aggressively did consumers (and many courts) fight to retain the benefits of fixed rate transactions. Among these perceived benefits was the ability of the homeowner to "sell" his low interest mortgage to a purchaser. It is not difficult to understand the homeowner's dismay when an otherwise agreeable resale is hamstrung by the lender's insistence on a rate increase: the burden of that rate increase on the purchaser can only be compensated for by lowering the sale price of the home. In the homeowner-seller's eyes, therefore, the exercise of the due-on-sale clause amounted to the lender stealing the homeowner's equity; for the prospective purchaser, the clause denied him the benefit of his bargain-priced mortgage, or even priced him out of home ownership altogether. On the lender's side, of course, the due-on-sale clause was an altogether rational way to upgrade the yield on existing mortgage loans, satisfying the lender's need for a decent margin between income and cost of funds.

The Court Decisions

The courts quickly became the battlefield on which the enforceability of due-on-sale clauses was tested. The lawsuits arose in several ways. If the seller or prospective purchaser asked about the lender's assumption policy and were refused a waiver of the due-on-sale clause except at a substantially higher rate, either of those parties might sue the lender for a declaration that the clause was unenforceable, or for an injunction against foreclosure. Some homeowners attempted to sell their interests without the lender's knowledge, as through an unrecorded land contract,[7] but through reports from the casualty insurance carrier or otherwise the lender learned of the attempted sale and initiated foreclosure proceedings pursuant to the due-on-sale acceleration provision. In either case, the clause was presented to the courts in the context of an adamant lender and an equally determined consumer. In many cases the seller may have already moved out and the purchaser taken possession of the premises, so that the due-on-sale issue became associated with the hardships of an eviction. It is not surprising that the debate became an emotional one.

Some of the court decisions in the late 1960s and early 1970s simply assumed that the clause was a proper and enforceable part of the mortgage contract. Others, in an eclectic pattern, suggested that a court could properly evaluate the reasonableness of enforcement in a given case, and could refuse to allow the clause to be implemented where the result would be inequitable.[8] Then, in 1978, in *Wellenkamp v. Bank of America,*[9] the Supreme Court of California rendered a decision that invalidated the clause as a rate-adjustment device, and which became a landmark for courts in other jurisdictions.

The substance of the *Wellenkamp* holding was that a due-on-sale clause was against public policy as a unreasonable restraint on alienation, except where the creditor could show that

the proposed sale would threaten the collateral or increase the risk of default. The decision therefore created a presumption against the validity of the clause, unless, as one commentator said, the lender could prove that the "proposed transferee is a bankrupt, or a convicted arsonist, or both."[10] The implicit holding in *Wellenkamp* is that the original mortgagor has a vested contractual right to keep or sell his original interest rate. Said the court in the heart of its opinion:

> 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 . . . 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]

The substance of the Wellenkamp holding was that a due-on-sale clause was against public policy as an unreasonable restraint on alienation, except where the creditor could show that the proposed sale would threaten the collateral or increase the risk of default.

The *Wellenkamp* decision has been followed by courts in other states, and several more have enacted its rule by statute. Approximately twenty jurisdictions now bar use of the clause merely to impose a higher interest rate. At the same time, courts in other states have looked more favorably on the clause, finding it a legitimate contractual option between mortgage lender and borrower. Some of these holdings emphasize that there will be larger benefits to consumers generally if the flow of mortgage money is not stifled.[12] Some find there is not a restraint on alienation at all, under conventional property law principles.[13] Still other states approve due-on-sale clauses to increase the interest rate, but caution that a court of equity might refuse enforcement where acceleration of the due date would be "unconscionable or inequitable conduct by a lender," such as might be the case with interspousal transfers.[14]

Both lenders and consumers tend to view the due-on-sale issue narrowly – in terms of slumping yields to the lenders, or in terms of frustrated sales by the buyers. It is possible to catalog factors on both sides of the debate, which together suggest that due-on-sale is neither a simple economic nor legal matter, but is laden with considerations of housing policy, institutional soundness, and consumer protection. The major arguments advanced by proponents and opponents are summarized below.

...factors on both sides of the debate ...suggest that due-on-sale is neither a simple economic nor legal matter, but is laden with considerations of housing policy, institutional soundness, and consumer protection.

In Favor of the Enforceability of Due-on-sale Clauses. 1. The clause is a freely negotiated term of the mortgage, and therefore ought to be as binding as any other part of the agreement.

2. The lender's expectation is that, on average, each mortgage will roll over about every seven or eight years; the initial rate is therefore set with that expectation in mind.

3. Allowing the lender to adjust its loan portfolio in line with current interest rates is necessary to maintain the soundness of mortgage lending institutions, to promote the flow of mortgage credit, and to assure a viable secondary mortgage market.

4. The clause does not "unreasonably" or in any other way restrain the mortgagor's ability to

sell: it simply creates an option as to one term of that resale, the interest rate. After all, the note could have been payable on demand from the outset without being any kind of restraint on alienation.

5. The clause merely preserves for the lender a reciprocal right to increase the rate; the mortgagor is always free to refinance at lower rates if the market falls.

6. Failure to enforce the clause forces those mortgagors who hold their mortgages for long periods or for their full term to subsidize purchasers who assume mortgages at less than market rates. This is so because rates generally will be increased as a hedge against future market fluctuations, and the likely loss of yield through assumptions.

7. Exercise of the clause does not "steal" any part of the mortgagor's equity because, for appraisal purposes, the fair market value of the property at any given time has to take into account the availability of current financing.

8. Use of the clause is undistinguishable in function from variable or adjustable rate mortgages, which are widely approved financing alternatives.

Arguments From the Mortgagor's or Buyer's Perspective. 1. Far from being a freely negotiated provision of the mortgage, the due-on-sale clause is generally part of the boilerplate in a take-it-or-leave-it contract of adhesion. Moreover, some versions of the clause do not even disclose explicitly that the mortgage will be assumable only if the transferee agrees to a higher interest rate.[15]

2. The original mortgagor has the contractual right to pay the initial rate for the full mortgage term, and the lender must accept that rate. Why, then, cannot the consumer "sell" that contractual right just as he or she could sell his car or furniture?

3. Rather than allowing lenders to adjust their portfolios to current rates, the clause rewards lenders for bad economic planning. At worst, it assumes and may contribute to "implacable inflation."[16]

4. While the clause is not a restraint on alienation in the classical sense of a forfeiture provision, its practical effect can be to preclude home sales. Monthly payments affordable at 10 percent may quickly become unaffordable at 17 percent. For instance, monthly payments would be $702.06 on a 30-year $80,000 mortgage at 10 percent, but $1140.54 on the same mortgage at 17 percent – a difference of over $400 a month in the debtor's cash flow. Thus, the clause frustrates housing mobility both for sellers and for their prospective buyers, a result that may fall most heavily on minorities, women and other protected groups.

5. The "reciprocal" nature of the due-on-sale clause is imaginary. No fixed rate mortgage obligates the lender to *reduce* the rate if the market drops. Any theoretical right of the mortgagor to take advantage of a lower market rate by refinancing elsewhere is nullified by prepayment penalties and settlement costs.

6. The extent of any subsidization (of assuming buyers by long-term mortgagors) is speculative, and is probably insignificant compared to the benefits of readily marketable [low mortgage rate] housing stock.

7. Appraisal practices notwithstanding, a home seller who must lower his asking price to reflect the higher rate demanded by a lender under a due-on-sale clause has lost a part of his investment in the home which he could recoup but for the due-on-sale clause. Moreover, if the seller remains secondarily liable on the assumed mortgage with its higher rate, that seller's contractual risk has been substantially increased at the new rate.

8. The comparison to formal adjustable rate mortgages is inapt; those instruments are replete with disclosures, have fixed intervals for rate changes, and often have caps on the amounts of periodic or aggregate rate increases. Due-on-sale clauses have no equivalent protections.

While these contentions on both sides of the issue appear to match, one for one, some of the arguments are obviously weightier than others. This writer's personal balancing would give extraordinary weight to factor 3 on the lender's list: the need to assure a future source of mortgage funds, even at the cost of some pain to current mortgagors and buyers. I would therefore opt for the general enforceability of due-on-

sale clauses absent strong mitigating circumstances in individual cases. Still, a fair assessment of these pros and cons suggests that there are respectable contentions on both sides. A policymaker (court or legislature) could rationally opt for either position after weighing the competing factors to determine which represent, in its view, the more legitimate balancing of economic, legal, and social values. That determination then involves an act of judgment, not of measurement, which is what has happened in those states that have restricted the clause. And its own judgment is what the Supreme Court will implicitly bring to these issues when it decides the *de la Cuesta* case.

Agency Regulations and Preemption

The immediate question before the Court will not be the wisdom of due-on-sale clauses in the abstract, for another policy-maker has already spoken on that matter. The Federal Home Loan Bank Board, by interpretation since 1948 and by a formal regulation issued in 1976 and recently expressly reaffirmed,[17] has ruled that federally chartered savings and loan associations may routinely include due-on-sale clauses in their mortgage instruments, and that such clauses are enforceable despite any state law to the contrary. The Bank Board has stated its intention unequivocally:

> [T]he Board has determined that the due-on-sale clause normally is a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments. . . .
>
> Federal associations shall be governed exclusively by the Board's regulations, in preemption of and without regard to any limitations imposed by state law on either their exclusion or exercise. . . .[18]

The Board's regulation, by its terms, should leave no room for court holdings like *Wellenkamp*. So strong, apparently, is the sentiment favoring the due-on-sale clause among the federal agencies supervising mortgage lenders that the National Credit Union Administration *requires* inclusion of the clause in federal credit union mortgages, and the Comptroller of the Currency has recently proposed a regulation for national banks parallel to that of the Bank Board.[19] Each of these initiatives states its intention to preempt incompatible state laws.

This regulatory activity appears to be a classic case of federal preemption of state-law barriers to national marketplace needs. Under the general enabling authority of the Home Owners Loan Act of 1934, the Bank Board has determined that the nation's housing policy is best served by permitting federally chartered lenders to use nationwide a contractual device that is not universally approved in the states. It is the same kind of judgment that underlies many of the regulatory policies of the Bank Board, the Comptroller, and other federal agencies – such as the several agency regulations permitting variable and adjustable rate mortgages.

So strong, apparently, is the sentiment favoring the due-on-sale clause among the federal agencies supervising mortgage lenders that the NCUA requires inclusion of the clause in federal credit union mortgages....

The California appellate court in *de la Cuesta*, however, has reasoned to the conclusion that despite its apparent clarity, the Bank Board regulation does not preempt California law, and therefore under *Wellenkamp* the due-on-sale clause remains unenforceable. The court's analysis proceeds as follows:

- Neither Congress nor the Bank Board has claimed to occupy the whole field of mortgage law for federal associations; matters of foreclosure, recordation, and the like, are still governed by state law. Thus, state property law remains generally applicable to federal associations.
- Whether state due-on-sale restrictions are specifically preempted is a matter of congressional intent, not Bank Board decree.

Congress has not yet addressed due-on-sale clauses.

- Nor is it impossible for a federal association to comply with both the Bank Board regulation and state law: the Board merely authorizes but does not mandate use of due-on-sale clauses, and California law does not bar all use of the clause, only its "unreasonable" use to increase rates. If the national interest in establishing uniformity of loan practices and instruments is paramount, why doesn't the Board *require* use of the clause?
- Further, the FHLMC form involved in the case (which included the due-on-sale clause) also provided that the mortgage "shall be governed by the law of the jurisdiction in which the property is located," thus specifically invoking California state law.[20]

The same preemption question has produced some division of opinion in other courts. Several cases have essentially agreed with the holding in *de la Cuesta,* while others have concluded that the Bank Board rule does effectively and properly preempt any state barriers to due-on-sale enforcement. For example, a federal court in Florida found the preemption justifiable by stressing the need for uniformity and stability in the secondary mortgage markets:

> The Board has determined the power to renegotiate interest rates upon transfer of the property is essential to the savings and loan association system's success. Thus by rule and resolution it has asserted the unique federal interest. Uniform marketability is an inherent underpinning of that interest, as is continued availability of funds for loaning. They would not exist if each state could determine if the due-on-sale clause could be used to require an interest rate mortgage change. The importance of the mortgage resale system and sufficient association income to the [Home Owners Loan Act] gives the federal government an overriding interest in the subject matter demanding uniformity.[21]

In this writer's view, the Supreme Court will, and ought to, reverse the California court in *de la Cuesta,* for the lower court's analysis is too restricted, and its holding too diffuse, to stand up under scrutiny. That court downplayed or ignored the desperate plight of the savings and loan industry and of the mortgage market in general, and the legitimate federal interest under the Home Owners Loan Act in maintaining a flow of mortgage credit. It overemphasized the fact that the Bank Board regulation merely authorizes (but does not require) due-on-sale clauses; inclusion of the clause becomes a practical necessity for mortgages destined for resale in the secondary markets, but might safely and understandably be omitted in some other transactions. Likewise, the court exaggerates the role of the contract language generally invoking state law; that is a mere formality to assure that the residual law of California (and not some other state) applies to such matters as contract formation, recordation, and the like. In any event, the law of California includes federal laws applicable through preemption and federal supremacy.

...a federal court in Florida found the preemption justifiable by stressing the need for uniformity and stability in the secondary mortgage markets.

An affirmance of the California court would be explosive in another sense. If the Bank Board's due-on-sale regulation does not in fact displace state law limitations, then neither would other agency regulations that dictate different rules for transactions involving federally chartered institutions. The regulations of the Bank Board, the Comptroller, and the National Credit Union Administration authorizing adjustable rate mortgages could be subject to challenge.[22] So too would the whole array of federal regulations that are based on general enabling legislation and that specify certain operational rules for federal institutions. Conceivably, the only kinds of federal regulations that would be truly preemptive would be those based on explicit congressional directives where the institutions had no choice but to comply – Truth in Lending, or Equal Credit Opportunity, for instance. The California holding is therefore much too broad in its implications to sustain itself.

In sum, the *de la Cuesta* case promises to bring some conclusion to the debate over due-on-sale clauses, at least with respect to federal savings and loan associations. At the outset, the Supreme Court will have to decide whether the Bank Board's authorization of such clauses preempts state restrictions. A decision on this point will have to take into account the legitimacy of the federal interest in a uniform national rule on due-on-sale, and this in turn will require the court to consider whether due-on-sale clauses are an appropriate technique to achieve that goal of uniformity. The Court's opinion will not necessarily articulate a detailed assessment of due-on-sale clauses as such, but its holding on preemption will implicitly reflect such an evaluation. As indicated above, this writer believes the Court will and should reverse the California holding.

The Court's decision will obviously affect the viability of other agencies' due-on-sale regulations. In addition, at stake indirectly are numerous other federal agency regulations that prescribe how federally chartered institutions may or must conduct their transactions. In this sense, the *de la Cuesta* case may dramatically influence the structure of federal regulatory mechanisms.

A Legislative Solution?

Since mid-1981, Congress has had under consideration a bill that would explicitly preempt state restrictions on due-on-sale clauses. This provision is temporarily trapped within the larger deregulation bill of which it is a part, S.1720,[23] and its enactment is altogether uncertain. In one respect, enactment of such an express statutory preemption would make the *de la Cuesta* case moot, at least for the future, for Congress would then have spoken directly to the merits of due-on-sale and there would be no basis for the continued application of state restrictions, such as in cases like *Wellenkamp*. The statutory proposal has a catch, however, for it authorizes the states to opt out of, or override, the federal preemption and reinstate their local law. This is the same mechanism used in the Bankruptcy Code and in the usury preemption provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980. While assuaging the proponents of states rights, this mechanism in the due-on-sale context could quickly restore the same hostility to due-on-sale that presently exists in many states. Since the statutory preemption would apply to *all* institutions, federally chartered as well as state chartered, a state override would arguably subject even federally chartered institutions to the state restrictions. Thus, an anomalous result of a statutory preemption could be that federal savings and loans would lose the protection of the current Bank Board regulation even if the Supreme Court upholds its validity.

Conclusion

Overall, this writer believes that due-on-sale is a transitory problem. In more stable markets in the past, use of the clause to adjust rates was of minimal concern because any rate adjustments were modest and neither the lender's nor the mortgagor's expectations were frustrated. Now and in the future, rate-sensitive mortgages are becoming more commonplace, if not the norm. The very controversy over due on sale has created a greater awareness that a fixed rate mortgage with a due-on-sale clause is in fact an adjustable rate instrument at the time of assumption. As consumers become more familiar with (and tolerant of, or resigned to) adjustable rate features, the "surprise" aspect of due-on-sale enforcement should become less troublesome. This change in expectations is facilitated whenever the due-on-sale clause spells out the rate adjustment option clearly and explicitly (as the standard FHLMC clause does). Within a few years, the use of due-on-sale clauses may therefore become an accepted part of mortgage folklore, just as points, settlement charges, escrows, and assumability have been in the past.

In the meantime, we can all await the Supreme Court's *de la Cuesta* decision with great interest.

As consumers become more familiar with (and tolerant of, or resigned to) adjustable rate features, the "surprise" aspect of due-on-sale enforcement should become less troublesome.

Notes

1. 121 Cal. App. 3d 328, 175 Cal. Rptr. 467 (4th Dist. Ct. App. 1981). The Supreme Court of California declined to review the case, and the U.S. Supreme Court noted probable jurisdiction. 50 U.S. Law Week 3585 (1982).

2. Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221 (1980).

3. The Federal Home Loan Bank Board, the Comptroller of the Currency, and the National Credit Union Administration have all adopted regulations authorizing variable rate mortgage loans. *See* 12 C.F.R. §545.6-4, as amended by 46 Fed. Reg. 24148 (1981); 12 C.F.R. Part 29, as amended by 46 Fed. Reg. 18932 (1981); 12 C.F.R. §701.21-6B, as amended by 46 Fed. Reg. 38669 (1981).

4. Sometimes, but not always, the rate adjustment option is made explicit in the clause. For example, the standard covenant in forms of the Federal Home Loan Mortgage Corporation (Freddie Mac) includes this language:

> Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender *and that the interest payable on the sums secured by this Deed of Trust shall be at such rates as Lender shall request.*

(Emphasis added).

5. See generally Note, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability,* 27 Stan. L. Rev. 1109 (1975).

6. For a discussion of the effort to develop a standardized due-on-sale clause for the secondary market, see Blocher, *Due-on-Sale in the Secondary Mortgage Market,* 31 Cath. U. L. Rev. 49 (1981).

7. Borrowers' attempts to argue that sale under a land contract or land trust does not trigger the due-on-sale clause have failed. See, *e.g., Lipps v. First Amer. Serv. Corp.* (Va. Sup. Ct. 1982) (as reported in 50 U.S. Law Week 2460, Feb. 2, 1982); *Williams v. First Fed. Savings & Loan Ass'n.,* 651 F.2d 910 (4th Cir. 1981).

8. This caselaw is reviewed extensively in Blocher, *supra* note 6.

9. 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 (1978).

10. Blocher, *supra* note 6, at 63.

11. 21 Cal. 3d at 952-53, 148 Cal. Rptr. at 385, 582 P.2d at 976.

12. *Williams v. First Fed. Savings & Loan Ass'n.,* 651 F.2d 910 (4th Cir. 1981).

13. *Occidental Savings & Loan Ass'n v. Venco,* 206 Neb. 469, 293 N.W.2d 843 (1980).

14. *Mills v. Nashua Fed. Savings & Loan Ass'n,* 433 A.2d 1312 (N.H. 1981).

15. Until now, under Truth in Lending, lenders have not had to disclose anything about their assumption policies. But under the revised Regulation Z, implementing the Truth in Lending Simplification and Reform Act and effective on October 1, 1982, lenders will have to make a brief disclosure about whether residential mortgages are assumable on their original terms. Regulation Z, §226.18(q). In the case of due-on-sale clauses, a lender might satisfy this requirement either by stating merely that the mortgage was *not* assumable on the original terms or perhaps by indicating that it was assumable only under certain conditions. In any event, the new Regulations Z did not require express disclosure of the rate increase option.

16. From the court's opinion in *First Federal Savings & Loan Ass'n. v. Peterson,* 516 F. Supp. 732, 739 (N.D. Fla. 1981).

17. FHLBB, Statement of Policy Regarding Due-on-Sale Clauses in Mortgage Loan Contracts, 46 Fed. Reg. 39123 (1981) reaffirming 12 C.F.R. §545.8-3(f)).

18. 46 Fed. Reg. 38676 (1981) (to be codified in 12 C.F.R. §701.21-6(d)).

19. 46 Fed. Reg. 46964 (1981) proposing to add new 12 C.F.R. §30.1).

20. This language actually was not in the de la Cuesta mortgage, but appeared in the instrument in a companion case being heard together with de la Cuesta's. Even without this wording, though, the court found that the Bank Board regulation did not preempt California law in de la Cuesta's situation.

21. *First Fed. Savings & Loan Ass'n v. Peterson,* 516 F. Supp. 732, 739-40 (N.D. Fla. 1981).

22. In fact, the preemptive effect of the Comptroller's variable rate mortgage regulation is already under attack. *Conf. of State Bank Supervisors v. Lord,* Civ. No. 81-1591 (D.D.C. 1981).

23. The omnibus bill is S. 1720, titled the "Financial Institutions Restructuring and Servicing Act of 1981." The due-on-sale preemption provision is § 141.