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the effect of actually deceiving or misleading the public. . . ."[192] The other division of the court of appeals held that the term "does not require a showing of bad faith, malice, or wantonness, but rather, encompasses both conscious, purposeful violations . . . and blatant or deliberate disregard of the law by those who know, or should know, the requirements of the Open Meeting Act."[193] The Court of Criminal Appeals held that a showing of criminal intent was not necessary to support a conviction under the Act because the offense was classified as *in malum prohibitum*.[194]

These recent cases have answered some of the questions raised in this note. The importance of the Act and the existence of other areas of uncertainty indicate that further judicial clarification can be expected.

Open meeting legislation is in the finest tradition of American government and seeks to give substance to the ideals of democracy. Effective self-rule requires that the populace be informed, but this result cannot occur when the agencies of government conceal their actions behind closed doors. Public access to governmental processes should assist in promoting public confidence by replacing mistrust and suspicion with enlightenment and focused concern.

Open meeting legislation has further implications. The right of the people to be aware of and admitted to meetings of governmental agencies should not be considered in isolation. Rights are always accompanied by responsibilities. Open meeting legislation is meaningless if not utilized; the efforts of the legislature in drafting a statute as comprehensive as the Open Meeting Act call for a response from the citizenry in exercising these valuable rights that have been created. The Open Meeting Act should be a trumpet call sounding the occasion for a new commitment to citizen involvement in state and local affairs of government.

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Mortgages: Due-On-Sale Clauses in Oklahoma As Affected By *Continental Federal Savings & Loan Ass'n v. Fetter*

In these days of high inflation and fluctuating real estate and mortgage interest rates, lenders and potential borrowers are concerned with obtaining the most favorable terms possible from a mortgage contract. As interest rates

[192] Haworth Bd. of Educ. v. Havens, 52 OKLA. B.J. 1978, 1979 (Sept. 12, 1981). The case is also noteworthy because the violation of the Act consisted entirely of posting an inadequate agenda.

[193] *In re* Appeal From Order Declaring Annexation, 52 OKLA. B.J. 1981, 1985 (Sept. 12, 1981).

[194] Hilliary v. State, 630 P.2d 791, 793 (Okla. Cr. App. 1981).

rise, a mortgagor would benefit from the ability to use his low interest rate mortgage note to induce acquisition of his real estate. The ability to assume a mortgage at a lower-than-market interest rate is naturally very attractive to one looking to purchase real estate. Conversely, the lender would prefer to have that lower-than-market loan paid back so that the balance of the money due under the mortgage could be reloaned at current market rates in order to maintain a profitable loan portfolio. As a tool for accomplishing this latter goal, lending institutions have for some time utilized "due-on-sale" clauses in their mortgage contracts. More recently, "escalation" or "interest adjustment" clauses have been used to supplement due-on-sale language in mortgage contracts.

The purpose of this note is twofold. First, it will explain the rationale and desirability of due-on-sale and escalation clauses. Second, it will attempt to interpret the impact of *Continental Federal Savings & Loan Ass'n v. Fetter*[1] on future Oklahoma decisions dealing with the enforceability of such clauses.[2]

Due-On-Sale Clauses

A typical real estate mortgage contract will contain a provision that permits the lender to declare all sums secured by the mortgage to be due and payable immediately upon the transfer by the borrower of any part of, or interest in, the mortgaged property. Such a provision is commonly known as a due-on-sale clause.[3]

The ability of a lender to accelerate a mortgage upon the transfer of the property by application of a due-on-sale clause is desirable for two reasons. First, it permits a lender to maintain a satisfactory loan portfolio yield. By having money returned that would otherwise be locked in for long amortized periods, lenders are better able to offset the higher rates they pay on interest-bearing deposits.[4] Second, this ability provides security to the mortgagee because ownership of the mortgaged property can be regulated. Such an ability can be significant where the new purchaser is not creditworthy or is paying the balance of the purchase price primarily with borrowed money.[5]

[1] 564 P.2d 1013 (Okla. 1977).

[2] This note will not address "due-on-encumbrance" clauses (*see, e.g.*, La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971)); variable rate mortgages (*see, e.g.*, G. OSBORNE, G. NELSON, & D. WHITMAN, REAL ESTATE FINANCE LAW 677 (3d ed. 1979) [hereinafter cited as OSBORNE, et al.]; roll-over mortgages (*see, e.g.*, OSBORNE et al., at 680); or other similar tools used by mortgagees to maintain loan portfolio yields at sufficient levels.

[3] OSBORNE, et al., *supra* note 2, at 295.

[4] *See generally* Ashley, *Use of "Due-On" Clauses to Gain Collateral Benefits: A Common-Sense Defense*, 10 TULSA L.J. 590, 592 (1975).

[5] OSBORNE, et al., *supra* note 2, at 297.

Enforceability of Due-On-Sale Clauses

Most arguments against enforcement of due-on-sale clauses center around claims that they constitute an unreasonable restraint on alienation.[6] However, no American court has held a due-on-sale clause to be a per se invalid restraint on alienation.[7]

The issue of enforceability of due-on-sale clauses first arose in *Coast Bank v. Minderhout*,[8] where the California Supreme Court held due-on-sale clauses not to be per se invalid and declared that a test of reasonableness under the circumstances of each case would serve to test the enforceability of the clause.[9]

In *Cherry v. Home Savings & Loan Ass'n*,[10] the court discarded the reasonableness test presented in *Coast Bank* and held that in the usual case, due-on-sale clauses would be automatically enforced. The court expressly recognized the validity of lenders accelerating mortgages to take advantage of rising interest rates[11] and made no requirement that the lender show that the new buyer would pose any kind of security risk as a prerequisite for enforcement.[12]

Since the *Cherry* decision, courts in many jurisdictions have ruled upon the enforceability of due-on-sale clauses.[13] Although the decisions of the several jurisdictions that have passed on the enforceability issue are hardly consistent in every detail, certain patterns are perceptible.[14]

Automatic Enforcement Versus Presumption of Unenforceability

Courts apparently consider due-on-sale clauses as being either generally valid devices subject to automatic enforcement in the usual case,[15] or as generally invalid restraints upon alienation enforceable only upon a convincing display of necessity.[16]

[6] *See, e.g.*, Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1, 5 (1975); First Comm'l Title, Inc. v. Holmes, 92 Nev. 363, 550 P.2d 1271, 1272 (1976).

[7] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1017 (Okla. 1977); OSBORNE, et al., *supra* note 2, at 303.

[8] 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964).

[9] *Id.* at 316, 392 P.2d at 268, 38 Cal. Rptr. at 508.

[10] 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (2d Dist. Ct. App. 1969).

[11] *Id.* at 579, 81 Cal. Rptr. at 138.

[12] *Id.* at 579-80, 81 Cal. Rptr. at 138-39.

[13] *See, e.g.*, Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974); Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973); First Comm'l Title, Inc. v. Holmes, 92 Nev. 363, 550 P.2d 1271 (1976); Gunther v. White, 489 S.W.2d 529, 532 (Tenn. 1973).

[14] OSBORNE, et al., *supra* note 2, at 303.

[15] *See, e.g.*, Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1 (1975); First Comm'l Title, Inc. v. Holmes, 92 Nev. 363, 550 P.2d 1271 (1976).

[16] *See, e.g.*, Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972); Bellingham First Fed. Sav. & Loan Ass'n v. Garrison, 87 Wash. 2d 437, 553 P.2d 1090 (1976).

Courts that favor automatic enforcement of due-on-sale clauses will provide relief from unconscionable conduct of lenders in individual cases but apparently do not consider the validity of each clause on a case-by-case basis.[17] Rather, "the valid and accepted purpose sought to be achieved by the restraint in [the] mortgage . . . must determine the validity of the restraint and not the circumstances of each particular case."[18] Furthermore, in order to avoid enforcement of the clause, these courts place the burden on the mortgagor to show that enforcement would work an unconscionable hardship on him.[19]

Some courts that favor automatic enforcement of due-on-sale clauses expressly recognize the validity of accelerating real estate mortgages in order to obtain current interest rates on the balance of the mortgage debt.[20]

> The [mortgagees] under their contract have the right to insist upon the repayment of their loan in the event of sale, so that they can relend the money at an increased interest rate, and so maintain their supply of lending money at the level of their present cost of such money. In this situation, equity should not depart from the law which requires it to enforce valid contracts and strike down the acceleration option simply because its exercise will let the [mortgagees], not the [mortgagors], make the profit on the interest rate occasioned by the increased cost of money.[21]

Another court described the exercise of an option to accelerate a real estate mortgage in order to maintain the best possible mortgage portfolio as "eminently proper."[22]

Another justification for automatic enforcement of due-on-sale clauses is that automatic enforcement better enables title examiners to reasonably predict the effect of the clauses. One court said: "Since stability of real estate titles is of paramount importance it is necessary that the court follow a policy in construing restraints on alienation which will produce a reasonable degree of certainty."[23]

A second group of courts disfavor automatic enforcement of due-on-sale clauses. These courts place upon the mortgagee the burden of showing

[17] *See, e.g.*, Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1, 5 (1975); First Comm'l Title, Inc. v. Holmes, 92 Nev. 363, 550 P.2d 1271, 1272 (1976).

[18] Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1, 5 (1975).

[19] *See, e.g.*, Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1, 5 (1975); First Comm'l Title, Inc. v. Holmes, 92 Nev. 363, 550 P.2d 1271, 1272 (1976).

[20] *See, e.g.*, Malouff v. Midland Fed. Sav. & Loan Ass'n. 181 Colo. 294, 509 P.2d 1240 (1973); Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973).

[21] Gunther v. White, 489 S.W.2d 529, 532 (Tenn. 1973).

[22] Century Fed. Sav. & Loan Ass'n v. Van Glahn, 144 N.J. Super. 48, 364 A.2d 558, 561 (1976).

[23] Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 333 N.E.2d 1, 5 (1975).

reasonable necessity in order to justify enforcement of a due-on-sale clause.[24] They are unpersuaded by the interest market rationale for enforcement of due-on-sale clauses. Indeed, the California Supreme Court has recently rejected that justification outright,[25] contrary to an earlier express recognition of the inherent validity of such a justification.[26] To succeed in enforcing a due-on-sale clause in such a jurisdiction, the mortgagee must establish that the transfer will threaten the lender's security or increase the risk of default by the new purchaser.[27]

The leading case in support of requiring a showing of necessity in order to enforce a due-on-sale clause is *Wellenkamp v. Bank of America*.[28] The California Supreme Court specifically rejected the interest rate protection justification and thus officially disapproved of the earlier *Cherry* decision. Although the court recited several economic risks faced by commercial lenders, it was unmoved by them. In fact, the court found those risks to be foreseeable and foreseen economic conditions that lenders "should and do, as a matter of business necessity, take into account . . . when they initially determine the rate of payment and the interest on these long term loans."[29] Furthermore, the court placed upon the lender the burden of showing reasonable necessity for enforcement based on impaired security or risk of default.[30]

Escalation Clauses

Escalation clauses are devices used by lenders to supplement due-on-sale language. An escalation clause allows the lender to waive its right to accelerate the mortgage if certain conditions are met.[31] Generally, the conditions to be met include an approved credit standing and renegotiation of interest on the loan balance.[32]

In *Miller v. Pacific First Federal Savings & Loan Ass'n*,[33] the Supreme Court of Washington upheld the enforcement of an escalation clause in a real estate mortgage. The clause allowed the mortgagee, at his sole option, to

[24] It has been said that the grounds for acceleration must be "reasonable on their face." Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725, 728 (1972).

[25] Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

[26] Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (2d Dist. Ct. App. 1969).

[27] For a discussion of circumstances that threaten a mortgagee's security and/or increase the risk of default by the purchaser, *see* Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 639, 526 P.2d 1169, 1175, 116 Cal. Rptr. 633, 639 (1974).

[28] 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

[29] *Id.* at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385.

[30] *Id.* at 953, 582 P.2d at 977, 148 Cal. Rptr. at 386.

[31] *See, e.g.*, 12 C.F.R. § 545.8-3(g) (1980).

[32] *Id. See also* Miller v. Pacific First Fed. Sav. & Loan Ass'n, 86 Wash. 2d 401, 545 P.2d 546 (1976).

[33] 86 Wash. 2d 401, 545 P.2d 546 (1976).

consent to the change in title and to increase the interest rate on the loan balance "even without a showing of increased risk to the lender."[34]

Eight months after the *Miller* decision, the Washington court decided *Bellingham First Federal Savings & Loan Ass'n v. Garrison*[35] and held a due-on-sale clause (without supplemental escalation language) to be an unreasonable restraint on alienation absent a showing of impaired security by the lender.[36]

The Washington court distinguished its holding on the basis that the mortgage in *Miller* was construed only with respect to the provision allowing the lender to increase the mortgage interest on the loan.[37] Because the *Bellingham* mortgage had no such provision, it was held to be an acceleration clause and, as such, was subject to a requirement of necessity for enforcement.[38]

The *Miller* decision pointed out that the escalation provision may impair a seller's ability to command his *preferred* asking price, but it in no way restrains his ability to alienate the property.[39] The court concluded that the mortgagee in *Miller* "merely pursued its rights under a provision that was clearly stated in the agreement."[40]

Continental Federal Savings & Loan Ass'n v. Fetter

The Oklahoma Supreme Court has not dealt specifically with the issue of enforceability of due-on-sale clauses. It did, however, address the issue indirectly in *Continental Federal Savings & Loan Ass'n v. Fetter.*[41]

In that case, the lender sued to foreclose a mortgage based on the failure of the mortgagor and his vendee to pay a 1 percent transfer fee requested by the lender.[42] Continental Federal based its right to foreclose on an acceleration clause in the mortgage.[43] The mortgagors, on the other hand, claimed that the lender had insufficient grounds to accelerate the mortgage because the reason given for acceleration (nonpayment of a transfer fee) was not a part of either the note or the mortgage.[44]

The Oklahoma Supreme Court refused to foreclose the mortgage in *Fetter*. The basis on which the court made its decision is of great importance in interpreting the future impact of the case.

[34] *Id.* at 404, 545 P.2d at 549.

[35] 87 Wash. 2d 437, 553 P.2d 1090 (1976).

[36] *Id.* at 438, 553 P.2d at 1091.

[37] *Id.* at 438-39, 553 P.2d at 1091-92.

[38] *Id.*

[39] Miller v. Pacific First Fed. Sav. & Loan Ass'n, 86 Wash. 2d 401, 403-404, 545 P.2d 546, 548-49 (1976).

[40] *Id.* The court qualified its approval of escalation clauses by implying that inequitable or unconscionable conduct by the mortgagee could result in nonenforcement.

[41] 564 P.2d 1013 (Okla. 1977).

[42] *Id.* at 1015.

[43] *Id.* at 1016.

[44] *Id.*

The court made it clear that the issue on appeal was *not* the validity of the due-on-sale clause in the mortgage.[45] It accepted[46] the finding of the trial court "[t]hat the subject mortgage is a valid legal and enforceable instrument under which the plaintiff had a right to either approve or deny the transfer of its loan from the defendants Fetter to the defendants Liddell. . . ."[47] The court also found acceleration clauses to be "bargained-for elements of mortgages and notes."[48]

In the *Fetter* opinion, the court recited rationales for use of acceleration clauses generally[49] and due-on-sale clauses specifically.[50] It seems doubtful that the court meant to distinguish between the two kinds of clauses,[51] but the rationales given for each leaves some room for interpretation.

The rationale given for use of an acceleration clause was "to insure that a responsible party is in possession, to protect the mortgagee from unanticipated risks, and to afford the lender the right to be assured of the safety of his security."[52] Although this quote does not mention specifically the protection against rising interest rates, a fair reading of it would probably include such protection. An "unanticipated risk" may well include a fluctuation in interest rates.[53]

Such a conclusion seems likely in light of case law cited by the *Fetter* court in support of its determination that acceleration clauses are not void in Oklahoma as being contrary to public policy.[54] In the footnote text supporting that determination, the court cited a California case to explain the rationale of due-on-sale clauses.[55] That case expressly recognized the validity of a lender accelerating a mortgage to protect himself from "losing the benefit of a later increase in rates."[56] The California court continued: "[A] due-on-sale clause is employed . . . so that [the lender] may take advantage of rising in-

[45] *Id.* at 1017.

[46] *Id.*

[47] *Id.* at 1016.

[48] *Id.* at 1017.

[49] *Id.*

[50] *Id.* at 1018.

[51] The case cited by the court in support of its rationale for an acceleration clause, First Comm'l Title, Inc. v. Holmes, 92 Nev. 363, 550 P.2d 1271 (1976), dealt specifically with a due-on-sale clause. Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1017 (Okla. 1977).

[52] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1017 (Okla. 1977).

[53] *See, e.g.*, Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 577, 81 Cal. Rptr. 135, 138 (2d Dist. Ct. App. 1969): "When interest rates are high, a lender runs the risk they will drop and that the borrower will refinance his debt elsewhere. . . . On the other hand, when money is loaned at low interest, the lender risks losing the benefit of a later increase in rates."

[54] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1018 (Okla. 1977), *citing* Ray v. Oklahoma Furniture Mfg. Co., 170 Okla. 414, 40 P.2d 663 (1935).

[55] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1018 n.8 (Okla. 1977), *quoting* Medovoi v. American Sav. & Loan Ass'n., 62 Cal. App. 3d 309, 133 Cal. Rptr. 63, 71 (Dist. Ct. App. 1976).

[56] Medovoi v. American Sav. & Loan Ass'n, 62 Cal. App. 3d 309, 133 Cal. Rptr. 63, 71 (Dist. Ct. App. 1976).

terest rates in the event his borrower transfers the security."[57] Based on the Oklahoma court's latter explanation of the rationale for use of due-on-sale clauses, it is likely that it does indeed recognize the validity of protecting lenders against fluctuations in the interest rate market.

The *Fetter* court appears to require a mortgage acceleration and foreclosure to meet a test of reasonableness to be upheld.[58] Unclear, however, is which party shoulders the burden of alleging and proving the reasonableness or unreasonableness of the acceleration in issue. In *First Commercial Title, Inc. v. Holmes*,[59] the case cited by the Oklahoma court to describe the rationale for use of acceleration clauses,[60] the Nevada Supreme Court stated that due-on-sale clauses are entitled to automatic enforcement where there is an outright sale by the trustor-vendor.[61] Further, the court placed upon the mortgagor the burden of showing unenforceability: "A lender has the right to be assured in his own mind of the safety of his security without the burden of showing at each transfer that his security is being impaired."[62] The foregoing indicates that the Oklahoma court will require the mortgagor to establish the unreasonableness of the acceleration of his mortgage.

The *Fetter* opinion did not deal directly with the issue of enforceability of due-on-sale clauses.[63] Therefore, its impact on enforceability of due-on-sale clauses is uncertain.

The court seemed to stress two factors in its decision not to allow the foreclosure of the mortgage in *Fetter*. First, the underlying basis for the foreclosure (the assessment of a transfer fee) was not a provision of either the note or the mortgage and could not, therefore, be a bargained-for element of either.[64] Second, the basis for foreclosure was not reasonable under the circumstances.[65]

If these two factors are deemed required elements of enforcement in future suits, the issue becomes whether due-on-sale clauses meet those requirements.

1. *The "Bargained-For" Requirement*

As to the first requirement, the supreme court stated that acceleration clauses *are* bargained-for elements of notes and mortgages designed to pro-

[57] *Id.*

[58] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1018 (Okla. 1977).

[59] 550 P.2d 1271 (Nev. 1976).

[60] Continental Federal Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1017 (Okla. 1977).

[61] First Comm'l Title, Inc. v. Holmes, 550 P.2d 1271, 1272 (Nev. 1976).

[62] *Id.*

[63] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1016-17 (Okla. 1977).

[64] *Id.* at 1016, 1019.

[65] *Id.* at 1018-19. The court cited the case of Murphy v. Fox, 278 P.2d 820 (Okla. 1955) as being an example of an acceleration and foreclosure that would be unreasonable or unconscionable. The basis for that acceleration and foreclosure was nonpayment of taxes and mortgage installments as called for under the terms of the mortgage. The defaulting mortgagor tendered all sums due, and the court refused to enforce the acceleration clause based on a "technical default." *Id.* at 826.

tect the mortgagee.[66] The court did not disturb the trial court's finding that the mortgage was a valid and enforceable instrument.[67] Indeed, the findings of the trial court indicated a willingness on its part to enforce the due-on-sale clause before it.[68] The trial court found "[t]hat the subject mortgage is a valid legal and enforceable instrument under which the plaintiff had a right to either approve or deny the transfer of its loan. . . ."[69]

No reason appears to exist that would make escalation language any less bargained-for than a due-on-sale clause it follows. Rather, an escalation clause would put the mortgagor on even greater notice of the result of an unauthorized transfer of the secured property. Such notice would bolster even further the bargained-for nature of due-on-sale and escalation clauses.[70]

2. *The "Reasonableness" Requirement*

It is not as clear from the *Fetter* opinion, however, as to what circumstances will meet the court's requirement of reasonableness. The court cited *Ray v. Oklahoma Furniture Manufacturing Co.*[71] as authority for the reasonableness requirement.[72] The court quoted from *Ray*, stating the test for reasonableness to be:

> whether the restriction imposed on one party is greater than is necessary for the protection of the other . . . whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public.[73]

Such a "test" gives little help, as subjective factors must still be weighed in determining what is "necessary" or "fair." Left unanswered is the question of whether the exercise of a due-on-sale clause, in order to achieve a higher loan portfolio yield, would be reasonable in Oklahoma. However, adequate authority exists within the *Fetter* decision to support an affirmative answer.

For example, as noted earlier, the court cited *Medovoi v. American Savings & Loan Ass'n*[74] to explain the rationale for due-on-sale clauses.[75] The quotation from *Medovoi* came directly from *Cherry v. Home Savings &*

[66] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1016-17 (Okla. 1977).

[67] *Id.*

[68] *Id.* at 1016.

[69] *Id.*

[70] A lender could perhaps insure the bargained for status of due-on-sale and escalation clauses by making the language of the clauses as conspicuous as possible through the use of bold-face capital letters. Further, acceptance of such clauses could be signified by way of the mortgagor's signature on a line separate from the main body of the mortgage.

[71] 170 Okla. 414, 40 P.2d 663 (1935).

[72] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1018 (Okla. 1977).

[73] 170 Okla. 414, 40 P.2d 663, 665 (1935).

[74] 62 Cal. App. 3d 309, 133 Cal. Rptr. 67 (Dist. Ct. App. 1976).

[75] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1018 (Okla. 1977).

Loan Ass'n,[76] one of the earliest and most influential cases dealing with enforcement of a due-on-sale clause.

The *Cherry* decision held, *inter alia*, that a due-on-sale clause does not constitute an invalid restraint on alienation.[77] Further, the court held the use of a due-on-sale clause to take advantage of rising interest rates to be a perfectly valid action: "This is merely one example of ways taken to minimize risks by sensible lenders."[78]

The *Cherry* court considered prevailing economic realities in rendering its decision.[79] Other courts, using the philosophy of *Cherry* as precedent, have done the same.[80] As the *Cherry* case pointed out, "a substantial loan ordinarily is not obtained for the asking."[81] Generally, the original buyer/mortgagor is able to purchase realty only with the financial aid of an institutional lender. As was said in *Crockett v. First Federal Savings & Loan Ass'n*,[82] it is the lender who provides the opportunity for the initial purchaser to buy the realty.[83]

Most first real estate mortgages are given to secure loans so that real property may be purchased. It seems doubtful that the primary goal of a mortgagor in negotiating a mortgage would be to acquire a loan to be used as a bargaining tool in a subsequent sale. As *Crockett* points out:

> A prime purpose of the loan [is] to enable the buyer to purchase the realty. If the buyer sells before he obtains full equity, this purpose ceases. Under our free enterprise system the lender may lend his money under such terms as maximize his profits within the limits set by law.[84]

The reasons given by the above authorities indicate the inherent reasonableness of exercising a due-on-sale clause to protect against a rising interest rate market. The fact that the Oklahoma court cites to such cases to explain the rationale for the clauses[85] might indicate that it, too, finds such action to be reasonable.

The exercise of an escalation clause seems even more reasonable

[76] 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (Dist. Ct. App. 1969).

[77] *Id.*, 81 Cal. Rptr. at 139.

[78] *Id.*, 81 Cal. Rptr. at 138. *See also* Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973); Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973).

[79] Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135, 138 (2d Dist. Ct. App. 1969).

[80] *See, e.g.*, Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973); Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580, 585 (1976); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973).

[81] 276 Cal. App. 2d 574, 81 Cal. Rptr. 135, 138 (2d Dist. Ct. App. 1969). *See also* Crockett v. First Fed. Sav. & Loan Ass'n, 189 N.C. 620, 224 S.E.2d 580 (1976); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973).

[82] 289 N.C. 620, 224 S.E.2d 580 (1976).

[83] *Id.*, 224 S.E.2d at 585.

[84] *Id.*

[85] Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1018 (Okla. 1977).

because, as pointed out in *Miller v. Pacific First Federal Savings & Loan Ass'n*,[86] the seller's ability to alienate his property is in no way restrained (only his ability to command his preferred asking price is hindered).[87] It should again be noted that the Washington court has distinguished between enforcement of escalation clauses and due-on-sale clauses.[88] The latter was said to be unenforceable without a showing of impaired security,[89] while the former was an enforceable contract right "clearly stated in the [mortgage] agreement."[90]

The *Cherry* and *Crockett* cases provide further evidence of the reasonableness of escalation clauses and their exercise. Both cases dealt with the enforceability of due-on-sale clauses accompanied by escalation language. As the court stated in *Crockett*, the lender provided the opportunity for the initial purchase, and, therefore, "[i]t seems fair for the lender to be able to contract to receive an increased interest rate, on the very loan that is facilitating transfer of the property, in the event the original purchaser decides he is not going to continue ownership or pay off the loan. . . ."[91]

The *Cherry* court noted that a due-on-sale provision could not prevent a mortgagor from selling to a third party.[92] The mortgagee could, however, as a matter of contract right, refuse to accept the new purchaser as assignee of the mortgage unless the mortgagee received a satisfactory interest rate on the balance of the secured debt.[93]

The *Cherry* decision went so far as to say that there was no requirement that the lender act "reasonably" in deciding to enforce an escalation clause[94]: "[The mortgagee] had the power of free decision regarding use of its money by others, the right to determine in its own discretion whether it would exercise its option [to accelerate the debt], and it had no obligation to act only in a manner which others might term 'reasonable.'"[95]

The Effect of Wellenkamp v. Bank of America

As stated earlier, the California Supreme Court, in *Wellenkamp v. Bank of America*,[96] overturned the *Cherry* decision and those California

[86] 86 Wash. 2d 401, 545 P.2d 546 (1976).

[87] *Id.*, 545 P.2d at 548-49. *Accord*, Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135, 138-39 (2d Dist. Ct. App. 1969).

[88] Bellingham First Fed. Sav. & Loan Ass'n v. Garrison, 87 Wash. 2d 437, 553 P.2d 1090, 1092 (1976).

[89] *Id.* at 1091.

[90] Miller v. First Pacific Sav. & Loan Ass'n, 86 Wash. 2d 401, 545 P.2d 546, 548-49 (1976).

[91] Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580, 585 (1976).

[92] Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135, 138 (2d Dist. Ct. App. 1969).

[93] *Id.*, 81 Cal. Rptr. at 138-39.

[94] The court hypothetically equated an escalation clause with a due date, stating that the mortgagee need not act "reasonably" in refusing to waive either term. *Id.*, 81 Cal. Rptr. at 138.

[95] *Id.*, 81 Cal. Rptr. at 139.

[96] 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). It should be noted that after the *Wellenkamp* decision was announced, the California Supreme Court sent back for rehearing

cases which followed *Cherry*. Given the fact that *Fetter* relied on the philosophy of *Cherry*, what effect should *Wellenkamp* have on future Oklahoma decisions concerning due-on-sale and escalation clauses? The answer is probably none, because the underlying rationale of *Cherry* is still valid today. As noted earlier, long-term amortized loans expose lenders to various risks.[97] Lenders, therefore, should be allowed to remain as secure as possible in the creation and administration of such loans.

The statement in *Wellenkamp* that lenders should and do take possible market fluctuations into consideration when setting interest rates[98] does not take into account the economic realities of today. Given the volatile nature of the money market, coupled with the current political and economic climates, both nationally and internationally, it would require uncanny insight to project accurately the possible market fluctuations over the course of a three-decade loan.

A 1970 study indicated that the average life of real estate mortgage loans is approximately eight to ten years.[99] As of year-end 1978, all operating savings and loan associations held 82.7 percent of their total assets in mortgage loans.[100] If a mortgage securing a loan with a lower-than-market interest rate were allowed to be passed from one party to another and not be subject to acceleration by the lender, it would be the unusual loan that did not go the full term before completely paid. If mortgages were allowed to continue in that manner, the bulk of the lender's assets (mortgage loans) would bear an unprofitable return for many years past their anticipated profitable life (if demand obligations earned higher rates than rates received on such mortgage loans).

Medevoi v. American Sav. & Loan Ass'n, originally decided at 62 Cal. App. 3d 309, 133 Cal. Rptr. 67 (Dist. Ct. App. 1976) (cited by the Oklahoma Supreme Court in Continental Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1018 (Okla. 1977)).

On rehearing, at 89 Cal. App. 3d 244 (Dist. Ct. App. 1979), the court of appeals interpreted *Wellenkamp* to apply only to those property transfers in which an owner of a single family residence engages in a transfer of his interest in the secured property. *Id.* at 257. *Wellenkamp* was held inapplicable to involuntary transfers or to transfers of commercial property. *Id.* However, the California Supreme Court ordered the latter *Medevoi* decision decertified, "a process by which the California Supreme Court deletes opinions certified for publication by the Appellate Division." Nussbaum & Stein, *Due-on-Sale Clauses Split the Courts*, NAT'L L.J., Oct. 20, 1980 at 17, col. 1, cont'd at 18, col. 3.

At least one other court has reached the same conclusion as the latter *Medovoi* decision. In Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n, C-50637 (Minn., endorsed Apr. 3, 1981), it was held that where a mortgage contract is negotiated by experienced business people, and there is no allegation of improper conduct, fraud, duress, coercion, or overreaching, a due-on-sale clause does not constitute an unlawful restraint upon the alienation of investment property. *Id.*, slip op. at 28.

[97] See text accompanying notes 5 and 78, *supra*.

[98] Wellenkamp v. Bank of America, 21 Cal. 3d 943, 952, 582 P.2d 970, 976, 148 Cal. Rptr. 379, 385 (1978).

[99] UNITED STATES LEAGUE OF SAVINGS & LOAN ASSOC., RECOMMENDATION OF THE COMMITTEE ON SAVINGS ASSOCIATION NEEDS (1970).

[100] UNITED STATES LEAGUE OF SAVINGS ASSOC., SAVINGS & LOAN FACT BOOK (1979).

Effect of Nonenforcement of Due-On-Sale and Escalation Clauses

Nonenforcement of due-on-sale and escalation clauses could result in far-reaching unfavorable consequences. Quite possibly, long-term loans would become unavailable from some lenders who would feel forced to protect against long-term interest rate increases. Such lenders would be forced to offer shorter term loans that would, of course, increase monthly installments on the debt.[101]

More likely, however, is the possibility that only state chartered institutions would be affected in such a manner. The regulations of the Federal Home Loan Bank Board, which affect all federally chartered savings and loan associations, expressly allow the use of due-on-sale and escalation clauses in the loan instruments of such associations.[102] Although these lenders are somewhat limited as to the exercise of due-on-sale clauses,[103] such exercise is generally "exclusively governed by the terms of the loan contract."[104]

Assuming these federal regulations are applicable to federally chartered savings and loan associations, notwithstanding state law decisions to the contrary,[105] state chartered associations could be put to great disadvantage if the exercise of due-on-sale clauses were not an option readily available to them. While state chartered lenders may be forced to protect against vagaries of the

[101] *See generally* Ashley, *Use of "Due-On" Clauses to Gain Collateral Benefits: A Common-Sense Defense*, 10 TULSA L.J. 590, 592 (1975).

[102] 12 C.F.R. § 545.8-3(f) (1980). "(f) Due-on-sale clauses. An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrowers without the association's prior written consent. . . . [A] Federal association . . . waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred . . . agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request."

[103] 12 C.F.R. § 545.8-3 (g)(1), (2) (1980). "a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument, (ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; . . ."

[104] *Id.* and § 545.8-3(f) (1980).

[105] This note does not address the validity of such an assumption. For discussions of this issue, *see* Comment, *Due-on-Sale Clauses and Restraints on Alienation: Does Wellenkamp Apply to Federal Institutions?*, 11 PAC. L.J. 1085 (1980); Comment, *A Case for Preemption; Wellenkamp v. Bank of America is Inapplicable to Federal Savings and Loan Associations*, 20 SANTA CLARA L. REV. 219 (1980). *Compare* Glendale Fed. Sav. & Loan Ass'n v. Fox, 459 F. Supp. 903 (C.D. Cal. 1978) *and* Conference of Fed. Sav. & Loan Ass'ns v. Stein, 495 F. Supp. 12 (E.D. Cal. 1979) *with* First Fed. Sav. & Loan Ass'n v. Lockwood, 385 So. 2d 156 (Dist. Ct. App. Fla. 1980).

market by offering only short-term loans with high monthly payments,[106] federally chartered lenders would be free to offer the traditional, long-term amortized loan with lower monthly payments. Naturally, prospective buyers would seek the latter to finance their purchase, thereby adversely affecting state chartered institutions.

Based on the foregoing, it seems that the ability to exercise a due-on-sale clause upon transfer of property could actually promote availability of mortgage money. One commentator noted that the availability of due-on-sale clauses has actually helped hold down overall mortgage interest rates.[107] Such positive results realized by enforcement of due-on-sale clauses should be kept in mind by courts when deciding the necessary requirements for enforcement of such clauses. Faced with the possibility that sources of mortgage money may dry up if due-on-sale clauses are not readily enforceable, it seems obvious that the benefits of the clauses far outweigh the burdens. As long as lenders are required to meet a good faith standard of conduct and act in a manner not unconscionable toward mortgagors, the interests of the public are adequately protected.

Conclusion

This note has demonstrated the inherent validity of due-on-sale clauses and the potential harms that could result from an inability to enforce them. Although arguments exist for severely restricting enforcement, they must give way to the economic necessities of our day. At a time when mortgage money is increasingly scarce and costly, courts should adopt positions that help keep a free flow of mortgage money available at rates affordable by persons other than just the wealthy.

This note also has explored the possible effects of *Continental Federal Savings & Loan Ass'n v. Fetter*[108] on the enforceability of due-on-sale clauses in future Oklahoma cases. Based on authority cited by the court in *Fetter*, the following conclusions may be fairly drawn:

(1) Due-on-sale clauses are not invalid restraints upon alienation.

(2) The exercise of due-on-sale clauses to obtain a higher interest rate on the balance of a loan is a valid, acceptable, and reasonable action.

(3) No showing of waste or risk to security is necessary to enforce a due-on-sale clause.

(4) Due-on-sale clauses are entitled to automatic enforcement absent a

[106] In Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973), the Colorado Supreme Court noted that: "If lenders were unable to make some form of interest rate adjustment on long term loans, they would have to make only short term loans amortized over periods of less than ten years. Original borrowers then would not be able to pay off their home purchases without having to refinance their indebtedness one or more times in the process. Short term loans would also increase monthly payments and make the obtaining of such loans prohibitive to many people."

[107] Ashley, *Use of "Due-On" Clauses to Gain Collateral Benefits: A Common-Sense Defense*, 10 TULSA L.J. 590, 593 (1975).

[108] 564 P.2d 1013, 1018, 1019 (Okla. 1977).