Wellenkamp v. Bank of America: The End of the Due-on-Sale Clause in California Real Estate Financing Arrangements

Lynne McGinnis

Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol13/iss2/7
WELLENKAMP V. BANK OF AMERICA: THE END OF THE DUE-ON-SALE CLAUSE IN CALIFORNIA REAL ESTATE FINANCING ARRANGEMENTS?

I. INTRODUCTION

A "due-on" clause is used in real property security transactions to allow a lender to declare a loan immediately due and payable upon transfer or encumbrance\(^1\) of the subject property.\(^2\) Such clauses emerged during the financial collapse of the Great Depression.\(^3\) At that time, the due-on clause was used primarily to assure the lender that the loan would only be assumed by a creditworthy buyer.\(^4\)

In the mid-1960's, lenders' use of the due-on clause changed dramatically. As a result of a rapid increase in interest rates, lenders used the due-on clause to raise loan portfolios to the current interest rates. Thus, lenders often agreed to waive acceleration\(^5\) upon sale of the subject property in return for a promise by the purchaser to pay a higher rate of interest.\(^6\) Borrowers and purchasers opposed to such conduct began to challenge due-on provisions in court.\(^7\)

---

1. When the event leading to the lender's use of the provision is an outright transfer of the property, it is often referred to as a "due-on-sale" clause. This phrase will be used to refer exclusively to these transactions.

2. Frequently, the due-on clause also contains a provision requiring the borrower to obtain the lender's consent before a sale of the property. Traditionally, the decision to demand repayment of the loan upon sale, or to withhold consent to assumption, has been subject to the unfettered discretion of the lender, except as limited by statute. \(\text{E.g., }\) CAL. CIV. CODE § 2924.6 (West Supp. 1980) forbids such action after certain transfers. If the borrower sells the property without obtaining the required consent, or does not pay the balance of the loan when demanded to do so, then the lender commences foreclosure proceedings against the property. Often the lender foregoes its right to demand immediate repayment of the loan if the purchaser agrees to assume the loan at an increased rate of interest. A written assumption agreement is then sent to the purchaser for his signature. A refusal to accept these conditions also leads to foreclosure proceedings.


4. *Id.*

5. "Acceleration" refers to the lender's demand for immediate repayment of the balance of the loan.

6. Kratovil, *supra* note 3, at 300. For a discussion of the propriety of allowing use of the due-on-sale clause to raise interest rates, see notes 81-86 *infra* and accompanying text.

Wellenkamp v. Bank of America\(^8\) involved the third challenge to due-on clauses to reach the California Supreme Court in the past seven years.\(^9\) In Wellenkamp, the court held that enforcement of a due-on clause by an institutional lender, upon an outright sale of the mortgaged property, constituted an unreasonable restraint on alienation, absent a demonstration by the lender that its security interest was impaired.\(^10\) The effect of Wellenkamp is virtually to eliminate all exercises of due-on-sale clauses in loan agreements subject to the holding.\(^11\)

This Note discusses the court's rationale in Wellenkamp. The court's reliance on prior California "due-on" cases and its use of the restraints on alienation doctrine to determine the validity of the due-on-sale clause are analyzed. It is suggested that requiring a buyer of mortgaged property to pay the current rate of interest via the due-on-sale clause should not, contrary to the court's assertions, be deemed unreasonable. Rather, unfair exercise of a due-on-sale provision in a particular case may make such a clause unenforceable because of established contractual and equitable principles. Therefore, the court's elimination of such clauses is unnecessary.

In addition, this Note explores several questions concerning the scope of the Wellenkamp holding. The applicability of Wellenkamp to non-institutional lenders, to loan agreements securing non-residential

9. The two cases preceding Wellenkamp were La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971) (acceleration upon encumbrance) and Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974) (acceleration upon execution of an installment land contract).
10. 21 Cal. 3d at 953, 582 P.2d at 976-77, 148 Cal. Rptr. at 386-87.
11. Even if the lender fears impairment to the security, it must litigate the propriety of acceleration. Given the time delays of litigation, an uncreditworthy buyer is likely to have already defaulted on the mortgage payments, and foreclosure will be necessary anyway. Exercise of the due-on-sale clause is therefore impractical. Hetland, After Wellenkamp (pt.1), CAL. REAL ESTATE MAGAZINE 40, 40 (Dec. 1978) [hereinafter cited as Hetland]. Thus, instead of attempting to enforce the clause, the lender faced with danger to the security will probably attempt to get a court-ordered receiver to prevent waste. Id.

There is further difficulty with the court's insistence on impairment to security. The court in Wellenkamp did not provide guidelines to be used in deciding how much less creditworthy a buyer need be before acceleration is proper. If justification for acceleration is found lacking, the lender may be liable to the borrower and purchaser for slander of title and breach of contract. Thus, even if the lender feels that there is sufficient justification, it might hesitate to commence foreclosure proceedings. Goodman, The Wellenkamp Decision: How Will it Affect Real Estate Financing, 54 CAL. STATE B.J. 34, 38 (Jan./Feb. 1979) [hereinafter cited as Goodman], citing Meadows v. Bakersfield Sav. & Loan Ass'n, 250 Cal. App. 2d 749, 59 Cal. Rptr. 34 (1967), in which the court of appeals indicated that an action for slander of title may lie against a lender for wrongfully recording a notice of default and sale pursuant to a deed of trust.
property, and to federally chartered savings and loan associations re-

mains in dispute.

Finally, this Note examines the use of alternative lending devices,
such as the variable rate mortgage, which enable lenders to recapture
some of the benefits formerly provided by the due-on-sale clause.

II. FACTS OF THE CASE

In July, 1973, the Mans' purchased a parcel of real property
financed by a $19,100 loan from the Bank of America, at an interest
rate of 8% per annum. The Mans' gave the bank their promissory note,
secured by a deed of trust on the property. The deed of trust contained
a standard due-on-sale clause.\(^\text{12}\)

Two years later, the Mans' sold the property to Cynthia Wel-
lenkamp. Wellenkamp paid the Mans' their equity and agreed to as-
sume the balance of their loan. Learning of the sale, the bank notified
Wellenkamp of its right to accelerate. The bank offered to waive accel-
eration if Wellenkamp agreed to assume the Mans' loan at the current
rate of interest, \(9 \frac{1}{4}\%\) per annum. When Wellenkamp refused, the
bank sought to enforce the due-on-sale clause, and filed a notice of
default and election to sell under the deed of trust. Wellenkamp sought
an injunction against enforcement of the due-on-sale clause.\(^\text{13}\)

The superior court dismissed the complaint, stating that automatic
enforcement of a due-on clause upon an outright sale of the property
was valid under California law. The court of appeal affirmed. Wel-
lenkamp petitioned the California Supreme Court for a hearing.

III. REASONING OF THE COURT

The supreme court granted Wellenkamp's petition and reversed
the decision of the trial court.

The issue in \textit{Wellenkamp} was whether the exercise of a due-on
clause in an outright sale\(^\text{14}\) constituted an unreasonable restraint on

\(^{12}\) In pertinent part, the clause provided that if the borrower "sells, conveys, alienates
\ldots said property or any part thereof, or any interest therein \ldots in any manner or way,
whether voluntarily or involuntarily, \ldots [the bank] shall have the right at its option, to
declare said note \ldots secured hereby \ldots immediately due and payable without notice
\ldots." 21 Cal. 3d at 946, 582 P.2d at 972, 148 Cal. Rptr. at 381.

\(^{13}\) The foreclosure proceedings were suspended pending the outcome of the litigation.
\textit{Id.} at 947 n.2, 582 P.2d at 972 n.2, 148 Cal. Rptr. at 381 n.2.

\(^{14}\) The court defined an outright sale as one in which both legal title and possession
pass to the buyer. \textit{Id.} at 949, 582 P.2d at 974, 148 Cal. Rptr. at 383.
alienation, absent a showing of impairment to the lender's security interest. The court summarized California law concerning restraints on alienation. Of primary importance to the court were two cases in which the California Supreme Court discussed whether or not the acceleration of a loan was an unreasonable restraint on alienation. In these cases, the court fashioned a reasonableness test, balancing the quantum of restraint with the justification for such restraint. Applying the reasonableness standard, the court concluded that enforcement of the clause in the two situations presented was unreasonable unless the lender demonstrated impairment to its security.

In Wellenkamp, the California Supreme Court employed the balancing test formulated in its prior decisions. Addressing first the question of the quantum of restraint, the court noted that assumption of an existing loan is often the only means by which a prospective buyer is able to obtain sufficient funding to purchase a piece of property. If the lender refuses to permit assumption and elects to exercise its option to accelerate, then transfer of the property may be prohibited entirely. If the lender permits assumption, but only at an increased rate of interest, then transfer is still inhibited. Thus, the buyer can insist that the

15. The Wellenkamp court noted that only unreasonable restraints are disallowed. Id. at 948, 582 P.2d at 973, 148 Cal. Rptr. at 382.
17. In the first case, the lender attempted to enforce a due-on clause upon the borrower's placement of a junior encumbrance on the subject property. La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971). In the other, enforcement of the provision resulted from the borrower's entrance into an installment land contract. Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974).
18. The balancing test as such was announced in Tucker. 12 Cal. 3d at 636, 526 P.2d at 1176, 116 Cal. Rptr. at 637. The Tucker court noted that the principles from which this test was derived were articulated in La Sala. Id. at 635, 526 P.2d at 1176, 116 Cal. Rptr. at 637. The court in La Sala stressed both the degree of restraint imposed by acceleration upon encumbrance, see 5 Cal. 3d at 880 n.17, 489 P.2d at 1123 n.17, 97 Cal. Rptr. at 859 n.17, and the reasons advanced by the lender for acceleration, see id. at 881, 489 P.2d at 1124, 97 Cal. Rptr. at 880. In doing so, the La Sala court was clearly using the Tucker "two tier" approach. For a discussion of the Wellenkamp court's use of La Sala and Tucker to justify its holding, see notes 35-70 infra and accompanying text.
19. La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d at 882, 489 P.2d at 1124-25, 97 Cal. Rptr. at 860-61; Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d at 638-39, 526 P.2d at 1175, 116 Cal. Rptr. at 639.
20. 21 Cal. 3d at 950, 582 P.2d at 974, 148 Cal. Rptr. at 383.
21. Id.
22. Id. at 950, 582 P.2d at 975, 148 Cal. Rptr. at 384.
The court next considered the two factors advanced in justification of enforcement of the due-on-sale clause: impairment of security, and the opportunity for the lender to raise the interest rate. The court concluded that because the resulting restraint is great, exercise of the due-on-sale provision is not justified unless a legitimate interest of the lender is threatened. Such interests do not include the lender's desire to maintain its loan portfolios at current rates of interest. A lender's legitimate interest extends only to the protection of the security from the danger of waste, should the buyer be uncreditworthy. The existence of a security risk is a question of fact to be determined by the circumstances surrounding a particular sale. The mere fact that the seller no longer retains an interest in the property after transfer of both legal title and possession does not necessarily endanger the security. Therefore, automatic enforcement of the due-on clause upon sale is unwarranted.

Thus, the Welenkamp court concluded that an institutional lender cannot exercise a due-on clause even upon a sale of the property, unless it can demonstrate that its security is impaired.

IV. ANALYSIS

A. Prior California “Due-On” Cases: Did the Welenkamp Court Correctly Interpret Its Own Precedent?

In the Welenkamp opinion, the California Supreme Court focused on three cases in which it addressed the question of the enforceability of due-on clauses. In Coast Bank v. Minderhout, the primary issue was not the propriety of the due-on clause. Rather, it was whether or not a written security agreement between the bank and the borrower constituted an equitable mortgage. The instrument in question in

---

23. Id.
24. Id. at 951, 582 P.2d at 975, 148 Cal. Rptr. at 384.
25. Id. at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385.
26. Id. at 953, 582 P.2d at 976-77, 148 Cal. Rptr. at 385-86.
27. Id. at 951-52, 582 P.2d at 975-76, 148 Cal. Rptr. at 384-85.
28. Id. at 953, 582 P.2d at 976-77, 148 Cal. Rptr. at 385-86.
30. An equitable mortgage is an executory agreement which is insufficient to create a legal mortgage. However, because the contracting parties adequately indicate an intent to make some particular property security for a debt, equity implies a mortgage. Thus, if an equitable mortgage is found, the creditor can enforce the debt by foreclosing the “lien” on the property.
Coast Bank contained an acceleration clause. In its adoption of the reasonableness test on restraints on alienation, the court suggested in dictum that the due-on provision was reasonable. The courts of appeal repeatedly interpreted Coast Bank as providing that due-on clauses constituted per se reasonable restraints. In the absence of further California Supreme Court opinions on the issue, this interpretation was the accepted law in California.

In 1971, the California Supreme Court decided its first "due-on" case since Coast Bank. In La Sala v. American Savings and Loan Association, the lender attempted to enforce the due-on clause when the borrower placed a junior encumbrance on the property. The crucial question in La Sala was whether the principles established in Coast Bank justified automatic enforcement of the due-on clause in the event of an encumbrance. Applying the reasonableness standard to the situation before it, the La Sala court concluded that Coast Bank was distinguishable on its facts. Because a junior encumbrance neither terminates the borrower's interest in the property nor involves a transfer of possession, the court reasoned, the encumbrance does not necessarily create a risk to the lender's security interest. Unlike acceleration upon sale, acceleration upon encumbrance imposes a significant restraint on alienation, by effectively prohibiting future encumbrances. The borrower will rarely, if ever, receive enough money from the junior encumbrance to pay the first trust deed in full. In addition,
acceleration upon sale permits the lender to loan the money to someone else at a more favorable rate of interest and ensures that all buyers of property finance at the current rate. This consideration does not exist in the instant situation when the property has not been transferred. Thus, the La Sala court concluded that acceleration when the borrower further encumbers the property is an unreasonable restraint on alienation unless the lender can demonstrate that its security interest is impaired.

In 1974, a lender's application of the due-on clause was again challenged in the California Supreme Court. In Tucker v. Lassen Savings and Loan Association, the event triggering acceleration was the borrower's entrance into an installment land contract. After briefly summarizing California law concerning restraints on alienation, the Tucker court held that the reasonableness of any restraint is determined by balancing the quantum of restraint against the justification for the restraint. As to the quantum of restraint, the court concluded that enforcement of the due-on clause prevents conveyance by installment contract. The court reasoned that the down payment on the contract, like the proceeds of the junior encumbrance in La Sala, 'does not often provide the borrower with the means to discharge the balance secured by the [first] trust deed.' The Tucker court then considered the justifications advanced by the lender for enforcement of the due-on clause: the risk of waste and the desire to raise the interest rate on the loan. The court concluded that the execution of an installment contract does not necessarily endanger the security, because the seller retains an equitable interest in the property until the purchase price is paid in full and, therefore, has the incentive to prevent the purchaser's default. The court also stated that the lender's desire to maintain its loan portfolios at current rates of interest does not justify use of the due-on clause when the borrower executes an installment land contract. Referring to the loan rate justification, the court stated that "[w]hatever

40. Id.
41. Id. at 878, 489 P.2d at 1121, 97 Cal. Rptr. at 857.
43. An installment land contract is a contract for the sale of real property in which the seller agrees to accept the purchase money from the buyer in installments. While the buyer gains possession of the property immediately, or after an agreed number of payments, legal title is not transferred until the entire purchase price is paid.
44. 12 Cal. 3d at 636, 526 P.2d at 1174, 116 Cal. Rptr. at 637.
45. Id. at 637, 526 P.2d at 1176, 116 Cal. Rptr. at 638.
46. Id. (citations omitted). 
47. Id. at 638, 526 P.2d at 1174, 116 Cal. Rptr. at 638.
48. Id. at 639 n.9, 526 P.2d at 1175 n.9, 116 Cal. Rptr. at 639 n.9.
cogency this argument may retain concerning the relatively mild restraint in the case of an outright sale . . . it lacks all force in the case of the serious and extreme restraint which would result from the automatic enforcement of 'due-on' clauses in the context of installment land contracts." After weighing the above factors, the Tucker court held that the lender cannot enforce the due-on clause when the borrower enters into an installment land contract, unless the lender can show impairment to its security interest.50

In Wellenkamp, the bank distinguished La Sala and Tucker on two grounds. Addressing the quantum of restraint issue, the bank contended that while acceleration upon encumbrance or sale of the subject property by installment land contract imposes a significant restraint on alienation, no such restraint exists when the property is transferred outright.51 For its assertion, the bank relied on La Sala and Tucker which stated that the restraint resulting from acceleration upon sale is de minimus.52

The Wellenkamp court disagreed with the bank's contention. The court maintained that the dictum in La Sala and Tucker, which was cited by the bank, concerned only "outright" sales, which the Wellenkamp court then defined as sales in which the seller receives full payment from the buyer.53

The bank further asserted that even if exercise of the due-on-sale clause upon an outright sale did impose a restraint, such restraint was justified. The bank offered two grounds for this conclusion. First, the borrower no longer has incentive to prevent waste and default, because he transfers both title and possession to the buyer.54 Second, in outright sales, lenders should be allowed to waive exercise of due-on-sale clauses and demand an increase in the interest rate of the loan to reflect current market conditions.55

In responding to these arguments, the Wellenkamp court acknowledged that it had formerly recognized a difference between junior encumbrances and installment contracts, where the borrower retains

49. Id. at 639 n.10, 526 P.2d at 1175-76 n.10, 116 Cal. Rptr. at 639-40 n.10.
50. Id. at 638-39, 526 P.2d at 1175, 116 Cal. Rptr. at 639. The Tucker court made repeated attempts to distinguish Coast Bank on the grounds that the language in Coast Bank concerned only "outright" sales. It is not altogether clear what the Tucker court meant by the term "outright." See notes 65-68 infra and accompanying text.
51. 21 Cal. 3d at 949-50, 582 P.2d at 974-75, 148 Cal. Rptr at 382-83.
52. Id. at 949, 582 P.2d at 974, 148 Cal. Rptr. at 383.
53. Id. The court reasoned that the restraint in such cases is slight because the seller receives enough cash to discharge the balance of the loan.
54. Id. at 951, 582 P.2d at 975, 148 Cal. Rptr. at 384.
55. Id. at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385.
some interest in the property, and sales, where he does not.\textsuperscript{56} However, the court reasoned that application of the \textit{Tucker} balancing test\textsuperscript{57} to outright sales mandated the conclusion that this mere absence of property interest does not warrant enforcement of the due-on-sale clause.\textsuperscript{58} The court also rejected the loan portfolio argument as an improper justification for exercise of a due-on-sale clause.\textsuperscript{59}

Upon examination of the bases for the decisions in \textit{La Sala} and \textit{Tucker}, it is apparent that the \textit{Wellenkamp} court's reliance on these cases was misplaced. In \textit{La Sala} and \textit{Tucker}, the court reaffirmed \textit{Coast Bank}, stressing the differences between sales and the transactions under consideration. Moreover, the \textit{Wellenkamp} court failed to notice that there was no mention in \textit{La Sala} of so-called "outright" sales. That term appeared for the first time in \textit{Tucker}.\textsuperscript{60} The court in \textit{La Sala} distinguished between sales and encumbrances.\textsuperscript{61} A sale divests the seller of any interest in the property. Acceleration in this situation, therefore, is permissible because the lender has a legitimate interest in maintaining, in a position of direct responsibility for the subject property, the parties upon whose credit rating it relied in making the loan.\textsuperscript{62} Contrary to a sale, an encumbrance neither terminates the borrower's interest in the property nor does it involve a transfer of possession.\textsuperscript{63} Thus, the \textit{La Sala} court concluded that while "the lender may insist upon automatic enforcement of the due-on-sale clause because such a provision is necessary to protect the lender's security . . . the power lodged in the lender by the due-on-encumbrance clause can claim no such mechanical justification."\textsuperscript{64}

There is further difficulty with the \textit{Wellenkamp} court's analysis of the \textit{Tucker} opinion. Although the court in \textit{Tucker} made several references to outright sales, the court did not necessarily intend the same meaning for the term as did the \textit{Wellenkamp} court. The term "out-

\textsuperscript{56} Id. at 951, 582 P.2d at 975, 148 Cal. Rptr. at 384.
\textsuperscript{57} See text accompanying note 44 supra.
\textsuperscript{58} 21 Cal. 3d at 951-52, 582 P.2d at 975-76, 148 Cal. Rptr. at 384-85.
\textsuperscript{59} Id. See notes 74-82 infra and accompanying text.
\textsuperscript{60} See 12 Cal. 3d at 634, 526 P.2d at 1172, 116 Cal. Rptr. at 636.
\textsuperscript{61} The \textit{La Sala} court stated:

[Although California cases have clearly held a due-on-sale clause valid, the language in such cases respecting due-on-encumbrance provisions is . . . entirely dictum. We must inquire into the bases upon which the cases approved the due-on-sale clause to determine whether these reasons apply in full measure to restraints against future encumbrances.

\textsuperscript{5} Cal. 3d at 879, 489 P.2d at 1122-23, 97 Cal. Rptr. at 858-59.
\textsuperscript{62} Id., 489 P.2d at 1123, 97 Cal. Rptr. at 859.
\textsuperscript{63} Id. at 880, 489 P.2d at 1123, 97 Cal. Rptr. at 859.
\textsuperscript{64} Id. at 883-84, 489 P.2d at 1126, 97 Cal. Rptr. at 862 (emphasis added).
right" is subject to more than one interpretation. An "outright" sale can refer either to a sale in which both legal title and possession pass to the buyer, although the buyer may take subject to or assume the existing loan, or a sale in which the buyer pays all cash for the property, enabling the seller to retire the outstanding mortgage.65

The Tucker court appeared to use "outright" in both of these contexts.66 At least one student author suggested that the distinction the court attempted to draw was between transactions such as encumbrances and installment contracts, in which the borrower retains some interest in the property, and sales, in which the borrower's equity is cashed out.67 Equating an "outright" sale to one in which the seller receives the purchase price in cash, the court in Tucker did not limit automatic enforcement of the due-on clause to sales of this type. Rather, the court ignored economic reality and assumed that every time both legal title and possession are passed immediately to the buyer, the buyer pays the seller the purchase price in cash.68

The Wellenkamp court misunderstood the context in which the term "outright" was used. The court eradicated the La Sala and Tucker distinction between transactions in which the borrower retains some interest in the property and those in which he does not. According to one commentator, the Wellenkamp decision "effectively disagrees with every prior due-on case in California."69 The distinction between sales in which the buyer pays the purchase price in cash and those in which

---

65. Note, The Demise of the Due-On-Sale Clause, 64 CALIF. L. REV. 573, 582 (1976). The author maintained that the passing of legal title and possession is a more reasonable interpretation of the phrase "outright sale."

66. At one point in its opinion, the court stated: [I]n the case of an installment land contract the vendor retains legal title until the purchase price has been fully paid . . . [he] 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. 12 Cal. 3d at 638, 526 P.2d at 1174-75, 116 Cal. Rptr. at 638-39 (emphasis added). Yet, earlier, in a footnote, the court maintained that "[by] the term 'outright' sale, we refer to the transaction wherein the seller receives full payment from and transfers legal title to the buyer." Id. at 634 n.6, 526 P.2d at 1172 n.6, 116 Cal. Rptr. at 636 n.6 (emphasis added).

67. Note, The Demise of the Due-On-Sale Clause, 64 CALIF. L. REV. 573, 582 (1976). In the course of its discussion, the Tucker court cited Coast Bank and La Sala for the proposition that enforcement of the due-on clause is reasonable when the property has been sold because "[a] sale of the property usually divests the vendor of any interest in that property, and involves the transfer of possession, with responsibility for maintenance and unkeep, to the vendee." 12 Cal. 3d at 634, 526 P.2d at 1172, 116 Cal. Rptr. at 636 (citations omitted).

68. The court's language supports this conclusion: "[In a sale] the trustor-vendor normally receives enough money through the financing of the second sale to pay off his note, and he is normally required to do so." Id. at 637, 526 P.2d at 1174, 116 Cal. Rptr. at 638.

69. Dunn, Enforcement of Due-On-Transfer Clauses, 13 REAL PROP., PROB., & TRUST J. 891, 914 (1978) [hereinafter cited as Dunn].
he does not is unwarranted. Regardless of whether cash is paid, a borrower divests himself of his interest in the property. Accordingly, he has no further incentive to prevent waste. In this regard, every sale results in an automatic impairment to the lender’s security interest.\footnote{Admittedly, the court in \textit{Wellenkamp} sanctioned acceleration when the buyer is insolvent or a poor credit risk. However, in most situations, this will not be the case. Yet, in issuing a loan, a lender relies upon a prospective borrower’s credit rating and personal background. When the property is sold and the loan is assumed, the lender is forced to accept a new debtor whom it has not had time to evaluate.}

\textbf{B. The Court’s Use of the Restraints On Alienation Doctrine to Determine the Validity of the Due-On-Sale Clause}

Fundamental to the \textit{Wellenkamp} decision was the notion that enforcement of the due-on-sale clause upon any sale of the mortgaged property, except a sale in which the purchase price is paid in full, constitutes a restraint on alienation.\footnote{A restraint on alienation is any restriction placed upon the owner of real property which hinders his power to convey an interest in that property.} The court reasoned that in times of inflation, funds available for real estate financing are in short supply, and property can only be sold if the buyer is permitted to give the seller a small down payment and assume the balance of the seller’s outstanding loan.\footnote{\textit{Id.}, 582 P.2d at 974, 148 Cal. Rptr. at 383.} If the lender refuses to permit assumption and exercises the option to accelerate the loan, then it can prohibit the sale of the subject property. Due to the difficulty of obtaining outside financing in an inflationary period, the buyer will be unable to substitute a new loan for the loan being called due. Furthermore, the small down payment which the buyer gives to the seller is not sufficient to discharge that loan.\footnote{\textit{Id.}, 582 P.2d at 975, 148 Cal. Rptr. at 384.}

An inhibitory effect on transfer results even if the lender is willing to waive acceleration in return for the buyer’s assumption of the existing loan at an increased rate of interest.\footnote{\textit{Id.}, 582 P.2d at 974, 148 Cal. Rptr. at 383.} If the buyer is forced to pay a higher interest rate, then he will insist that the seller lower the purchase price.\footnote{\textit{Id.}, 582 P.2d at 975, 148 Cal. Rptr. at 384.} Consequently, the seller must choose between lowering the purchase price and absorbing the loss, maintaining a higher purchase price and not attracting buyers, or refusing to sell.\footnote{\textit{Id.}.}

The court in \textit{Wellenkamp} is in error in its assertion that permitting assumption of the loan only at the current rate of interest results in an increased restraint on alienation. Obviously, if the buyer has to spend
a certain amount of the purchase money on interest, then the amount which he is able to pay to the seller is reduced. However, as the dissent noted in *Wellenkamp*, the resulting inhibition is not due to the exercise of the due-on-sale provision per se, but rather, to the fact that interest rates are high in an inflationary economy.\(^7\) If the property is unencumbered, then the prospective buyer will have to finance the purchase elsewhere, paying the current rates. Thus, there is no increased restraint caused by enforcement of a due-on-sale clause. The buyer is forced only to do that which he would have to do were he purchasing unencumbered property.\(^7\) In times when mortgage funds are difficult to obtain, the lender who allows assumption is actually facilitating transfer by relieving the buyer of the burden of obtaining outside financing.

Despite evidence to the contrary, the court reasoned that enforcement of due-on-sale clauses constitutes a restraint on alienability.

Applying the balancing test, the court then assessed the justification advanced for the restraint.\(^7\) The court held that the only adequate justification for such restraint is the protection of the lender against having to resort to the security upon default by an uncreditworthy buyer.\(^8\)

In so holding, the court rejected the bank's contention that a lender's desire to maintain its loan portfolios at the current rate of interest justifies the restraint imposed by the exercise of the due-on-sale clause.\(^8\) The court asserted that "a restraint on alienation cannot be found reasonable merely because it is commercially beneficial to the restrainer."\(^8\)

It is arguable that the lender's use of the due-on-sale clause to bring the interest rate up to the current market level is not unreasona-

---
7. *Id.* at 956-57, 582 P.2d at 978-79, 148 Cal. Rptr. at 387-88 (Clark, J., dissenting).
8. See *id.* at 956, 582 P.2d at 979, 148 Cal. Rptr. at 388. One commentator aptly summed up the *Wellenkamp* rationale:
[It] provides to the seller of favorably encumbered property an economic advantage in pricing over sellers of unfavorably encumbered identical property, under the guise of a restraint on alienation. . . . To label the loss of a purported favorable economic position as a restraint on alienation is a misconception of that doctrine which was not intended to provide profitability of alienation but only the ability to alienate without penalty. The loss of an advantage premised upon voiding of a contract can hardly be considered a penalty. This theory then simply espouses the breach of that portion of a contract which one finds unfavorable, and affirmance of that portion of a contract which is favorable.
Dunn, supra note 69, at 926.
9. 21 Cal. 3d at 951, 582 P.2d at 975, 148 Cal. Rptr. at 384.
10. *Id.*
11. *Id.* at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385.
ble. A period of inflation requires the lender to raise interest rates to increase the yield on its loan portfolios. One means by which the lender is able to accomplish this is through the due-on-sale clause. Admittedly, a strong argument can be made against permitting the exercise of a due-on clause when the borrower merely encumbers the property. In that situation, the lender is pressuring the borrower into altering a valid contract because that contract has become unfavorable to the lender. However, the same cannot be asserted when there is a sale. In a sale, both the borrower and the lender have the benefit of their original bargain. Not a beneficiary of the original contract, the prospective purchaser is simply required to pay the rate which would be demanded of him were he to obtain outside financing.

In purporting to strike down an unreasonable restraint on alienation, the *Wellenkamp* court announced a new rule which benefits only a limited number of individuals: buyers and sellers of encumbered real property. The price for the court's decision is paid not only by lenders, but by potential future borrowers who will face increased interest rates and decreased mortgage funds because lenders are locked into long-term, low interest loans. Perhaps the biggest burden is borne by sellers of unencumbered real property who do not have an attractive long-term, low interest loan to offer to prospective buyers. Thus, they will have a more difficult time selling their property.

### C. Possible Alternative Approaches to Remedy Abuse of the Due-On-Sale Clause

Due-on-sale clauses give a lender a great deal of power that may

---

83. Kratovil, *supra* note 3, at 309. Kratovil argued that assurance of the continued existence of financial institutions to finance the purchase of homes should be as important a policy objective as preventing abuse of the due-on-sale clause. He noted that most institutions making long-term real estate loans are savings and loan associations. Such associations make home purchases possible, by lending money and distributing earnings, in the form of interest, to depositors, many of whom are also home buyers. Raising interest rates upon the sale of mortgaged property increases the funds available for these two purposes. *Id.* at 314.

84. Century Fed. Sav. & Loan Ass'n of Bridgeton v. Van Glahn, 144 N.J. Super. 48, 54, 364 A.2d 558, 562 (1976). The New Jersey Superior Court noted that if interest rates drop, the borrower benefits at the expense of the lender. Thus, in this situation, the borrower can borrow elsewhere at the lower rate, and pay off the loan, forcing the lender to lend to someone else at the less favorable rate.

85. Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240 (1973) (exercise of a due-on clause presumed reasonable when the property has been sold).

86. Kratovil, *supra* note 3, at 314. Kratovil maintained that a person with enough cash to put a down payment on mortgaged property is hardly a "downtrodden consumer" in need of the type of protection which the holding in *Wellenkamp* was designed to afford.
be abused. There are alternative ways to deal with such abuses, while permitting exercise of the clause when it merely requires the prospective purchaser to pay the current rate of interest.

1. Unconscionability

The only means by which a lender can enforce a due-on-sale clause against an unwilling borrower is to foreclose the lien on the property. Because foreclosure is an equitable proceeding, traditional equitable defenses are available to the borrower. These defenses may be grouped under the general concept of unconscionability. It is well settled that a court in equity will refuse to enforce an unconscionable bargain. In general, relief should be provided from an acceleration provision if the lender acts unfairly, or if enforcement in the particular situation will cause oppression and injustice to the borrower.

Although a lender may justifiably condition a waiver upon payment of the current rate of interest, it should not be allowed to use the threat of acceleration to exact onerous collateral benefits from the borrower or purchaser. If additional waiver or transfer fees are demanded, then this should be prima facie evidence of unconscionability. This is indeed the law in California with regard to prepayment penalty provisions in deeds of trust. These provisions are presumed reasonable absent a showing by the borrower that the charges are exorbitant.

Even in the absence of such overreaching conduct on the part of the lender, a balancing of the equities may weigh against application of the acceleration clause in a particular case. Adopting this approach, the Wisconsin Supreme Court concluded that impairment of security,
which the *Wellenkamp* court used as the sole test of enforceability, is one of many factors to consider. In addition, a court should consider whether, at the time he entered into the contract, the borrower was aware that acceleration could be waived if a prospective purchaser of the property agreed to assume the loan at an increased rate of interest. Another factor to be taken into account is that the acceleration clause may be the result of an inequality of bargaining power. Laches and estoppel are other concerns bearing on enforceability.

One criticism levelled at permitting a lender to use the due-on-sale clause to maintain its portfolios at current interest rates is that the borrower, when signing the contract, may be unaware that the lender will exercise it for this purpose. This problem can be alleviated by redrafting the clause to state that part of the lender's criteria for determining the acceptability of a buyer is the latter's willingness to pay the current interest rate. Additionally, the clause might state that one of the purposes of the acceleration provision is to effect an increase in interest rates upon sale. These warnings have been encouraged by the Federal Home Loan Bank Board, which promulgates regulations governing federal savings and loan associations. These regulations require that at a time no later than the closing agreement, full disclosure of the contractual obligations be made to the borrowing party. This includes disclosure not only of the existence of the due-on-sale

---

96. For further consideration of the desirability of requiring full disclosure to the borrower of all possible uses of the due-on-sale clause, see text accompanying notes 100-04 infra.
97. This may also weigh in favor of a determination that the due-on-sale provision is an unenforceable contract of adhesion. See text accompanying notes 105-15 infra.
98. Mutual Fed. Sav. & Loan Ass'n v. American Medical Servs., Inc., 66 Wis. 2d at 218-19, 223 N.W.2d at 925. The borrower might raise the defense of laches if the lender waited an undue length of time before attempting to accelerate.
99. See id. at 219, 223 N.W.2d at 925. Estoppel might be found if the lender has, on past occasions, foregone any attempt to enforce the due-on clause.
100. See Hetland, *supra* note 11, at 43.
101. Kratovil, *supra* note 3, at 315 (arguing that such explanations should be part of the written mortgage agreement).
102. See notes 140-70 infra and accompanying text for a discussion of the inconsistencies between state and federal law with regard to due-on provisions.
103. 12 C.F.R. § 556.9(a) (1979) provides:

The Board (Federal Home Loan Bank Board) allows federal savings and loan associations certain authority to incorporate into loan instruments provisions for imposition of late charges, prepayment charges, and exercise of acceleration clauses. The Board expects associations to adopt procedures sufficient to ensure that, no later than the time of loan closing, the rights and obligations of the contracting parties are fully and specifically disclosed to borrowers.
clause, but also of its purpose and possible applications.

2. Contract of adhesion

A due-on-sale clause is a lender's contract option to call the loan due or negotiate the interest rate. A borrower against whom the provision is unjustifiably enforced can thus obtain relief through application of the traditional contractual remedy providing relief from a contract of adhesion.

A contract of adhesion is a standard form contract in which a weaker party is forced to agree, or "adhere" to, the terms presented by a stronger party. The contract terms reflect a basic inequality of bargaining power.

Recognizing that standardized contracts have a valid and useful function, courts have reasoned that inequality of bargaining power does not automatically render the contract invalid. The inequality of bargaining power must be manifested either in the contractual terms or in the enforcement of the contract.

Courts recognize that the nature of some contractual terms renders them automatically unenforceable. Often, the terms are so onerous as to be violative of public policy.

Alternatively, an agreement may contain terms which are acceptable when the contract is formed. It is abusive or unreasonable conduct on the part of the stronger party that makes a contract adhesive in its application.

A deed of trust is not invalid per se. However, because of the

---

104. If the lender conceals the existence of the clause from the borrower, then it might be voidable on that basis alone. See text accompanying notes 105-15 infra.
109. The most notable examples of clauses disallowed on this theory are disclaimers of warranties appearing in fine print on the back of contracts for the purchase of goods. E.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (automobile purchase contract). Further examples of such clauses are provided by agreements in which the adhering party relieves the party who drafts the contract of liability for the latter's negligence. E.g., Tunkl v. Board of Regents, 60 Cal. 2d 92, 382 P.2d 441, 32 Cal. Rptr. 33 (1963) (contract relieving hospital employees of liability for negligence).
111. See MCA, Inc. v. Universal Diversified Enterprises Corp., 27 Cal. App. 3d 170, 103
inequality of bargaining position between a relatively unsophisticated residential home buyer and an institutional lender, the homebuyer may be able to attack a provision in a trust deed on the grounds that it is adhesive as applied.

In determining whether or not a contractual term will be enforced when challenged under this theory, there are certain factors which the California courts consider. The court analyzes the term in light of the intent and purpose of the party in the weaker bargaining position. Furthermore, it assesses the knowledge and understanding a reasonable layperson would possess with respect to the challenged provision. Also important are the layperson's expectations as to the effect of the provision and the prominence of the provision within the text of the contract.¹¹²

Arguably, enforcement of a due-on-sale clause may be avoided as adhesive under these four factors. One advantage to the contract of adhesion approach is that the lender has the opportunity to make the clause non-adhesive by full disclosure to the borrower of the existence, purpose, and effect of the due-on-sale provision. Preliminarily, the due-on-sale clause should appear in clear and bold type in both the promissory note and the deed of trust.¹¹³ In addition, the lender should verbally inform the borrower of the existence of the provision and of its effect. As an added safeguard, such explanations should also be included in the deed of trust. These procedures afford an ignorant borrower needed protection, while ensuring the continued vitality of the due-on-sale clause to protect a lender's interests.

In the absence of the Wellenkamp rule, a due-on-sale clause is au-
automatically enforceable when there is no gross inequality of bargaining power between the lender and the borrower.\textsuperscript{114} Traditional remedies afforded under the theories of adhesion and unconscionability make the inflexible rule announced in \textit{Wellenkamp} unnecessary and undesirable. The court in \textit{Wellenkamp} ignored the desirability of the due-on-sale clause and failed to realize that unenforceability should be the exception rather than the rule. A party should not be able to escape his obligations under a valid contract, absent some showing that enforcement is unfair and unjust.\textsuperscript{115}

\textbf{D. Scope of the Wellenkamp Decision}

Many questions still remain regarding the scope of the holding in \textit{Wellenkamp}. Two fundamental unanswered questions are the decision’s applicability to 1) private (non-institutional) lenders, and to 2) non-residential property.

1. Private lenders

In a footnote in the \textit{Wellenkamp} opinion, the court expressly limited its holding to institutional lenders.\textsuperscript{116} The question of whether the court carved out an exception for non-institutional lenders, or exercised ordinary judicial restraint in only addressing the facts before it awaits resolution.\textsuperscript{117} In the absence of such a determination, it is useful to

\textsuperscript{114}. See notes 125-39 \textit{infra} and accompanying text for a discussion of whether or not \textit{Wellenkamp} should apply to other than residential mortgages taken out by unsophisticated homebuyers.

\textsuperscript{115}. Resort to amorphous concepts such as "unconscionability" results in an absence of guidelines to aid a lender or a borrower in determining the propriety of enforcing a due-on-sale clause in a given situation. Litigation each time enforcement is attempted is neither practical nor desirable. Ultimately, litigation must give way to a legislative scheme designed to regulate recurring abuses. The regulations promulgated by the Federal Home Loan Bank Board serve as an excellent example of such legislation. See note 103 \textit{supra} and notes 147-70 \textit{infra} and accompanying text. What is to be avoided is the judicial legislation which is apparent in \textit{Wellenkamp}. A legislature is best able to control any problems of due-on-sale clauses. See Dunn, \textit{supra} note 69, at 936; Kratovil, \textit{supra} note 3, at 316-17.

\textsuperscript{116}. 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 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.

\textsuperscript{117}. The supreme court was presented with an opportunity to rule on this issue in \textit{Demey} v. Joujon-Roche, No. 2-48408, 2d Dist. Div. 4 (certified for non-publication Apr. 9, 1979), which was appealed with \textit{Wellenkamp}. After granting a hearing in \textit{Demey}, the supreme court subsequently retransferred the case to the court of appeal with the instruction that it must be decided in light of the “substantive principles announced . . . in \textit{Wellenkamp}.” \textit{Demey} involved purchase money trust deeds executed to secure four 40 acre tracts of land.

21 Cal. 3d at 952 n.9, 582 P.2d at 976 n.9, 148 Cal. Rptr. at 385 n.9.
examine the desirability of a non-institutional lender exemption.

A “private lender” exclusion is meaningful only if the term “private lender” is defined. The court appeared to have envisioned a situation in which the vendor of the property takes back a purchase money deed of trust. This situation usually occurs when the buyer cannot obtain sufficient funds to purchase the property. To effectuate the sale, the seller “lends” the buyer money by passing legal title and possession, but he allows payment in installments. Often, such agreements contain a due-on-sale clause.

A strong argument can be made that the factors that persuaded the Wellenkamp court against enforceability of due-on-sale clauses are absent from the purchase money trust deed situation. Typically, the terms of the contract will be more negotiable with a private party than with an institutional lender. The agreement is less likely to be a contract of adhesion because the lender and the borrower are of more equal sophistication. Unlike an institutional lender, a private lender does not exercise a due-on-sale clause to raise interest rates. The only purpose behind such a provision in a purchase money trust deed is to assure that the seller will receive full payment of the purchase price. Therefore, any restraint that the due-on-sale clause imposes on a borrower who borrows from a private lender should be permissible because it is reasonable.

Two other considerations weigh in favor of continuing the “private lender” exclusion, at least in the situation presented above. An institutional lender, unlike a casual seller of real estate, is in the business of

---

Each trust deed was printed on a standard form, and each contained a typical due-on-sale clause. When the purchasers of this property opened up escrows to resell two of the tracts, the seller announced his intention to enforce the due-on-sale clauses. The seller offered to waive acceleration on two conditions: first, that the prospective buyers assume the payment of the trust deeds at the same rate of interest, and second, that they agree to retention of the due-on-sale clauses as to any further resale. When these conditions were refused, the seller commenced foreclosure proceedings. The purchasers brought suit. The court of appeal held that because there was nothing in the record indicating either impairment to the security or a risk of default, the seller had no right to exercise the due-on-sale clauses or to require assumption of trust deeds containing such clauses. The court awarded damages to the plaintiffs. Little can be deduced from the holding in Demey, however, as neither the seller nor the court mentioned the possibility that private lenders were exempt from Wellenkamp. Demey was appealed once again to the supreme court. The court ordered the opinion unpublished.

118. See Kratovil, supra note 3, at 308. Such a transaction differs from an installment land contract in that title, as well as possession, pass immediately to the buyer. The seller assures his receipt of the purchase price by taking back a deed of trust on the property.

119. Id.

120. For a discussion of these considerations and the conclusion that Wellenkamp should not apply to sellers taking back purchase money trust deeds, see Dunn, supra note 69, at 916-17.
making loans. The institutional lender has access to economic forecasts and information which are considered when interest rates are set. In addition, because the institutional lender makes numerous loans, it can spread the risk of a fixed interest rate by adjusting rates on new loans to reflect current market conditions.\footnote{Goodman, \textit{supra} note 11, at 38-39.} Furthermore, there are alternatives available to the institutional lender, such as the variable rate mortgage.\footnote{Hetland, \textit{supra} note 11, at 44. Hetland argued that the “private lender” exception should extend to all lenders subject to California’s usury laws, as other alternatives are not available to such lenders. Thus, Hetland maintained, these lenders should not be subject to the double burden of unenforceability of the due-on-sale clause and the usury limitations.} A brief look at the above factors strongly suggests that at least one type of “private lender”, the seller of property taking back a purchase money deed of trust,\footnote{This is the most noted and common type of “private lender.” Other “private lender” situations exist: a parent lending money to a child to buy real estate might include a due-on-sale clause to assure that the property remain in the family for a certain length of time. It is unnecessary to make an exhaustive list of “private lender” situations, however, as the considerations remain the same.} should be allowed automatic enforcement of a due-on-sale clause.\footnote{But cf. Sanders v. Hicks, 317 So. 2d 61 (Miss. 1975) (suggesting that a seller attempting to foreclose under a purchase money trust deed must nonetheless demonstrate reasonableness).}

2. Non-residential property

The property securing the loan in \textit{Wellenkamp} was a single family residence. Considerable debate has taken place regarding the applicability of the holding to other types of property.\footnote{For the purposes of discussion in this Note, non-single family residential property is referred to as commercial property.} Outlining the facts of the case before it, the \textit{Wellenkamp} court referred only to the “parcel of real property”\footnote{21 Cal. 3d \textit{at} 946, 582 P.2d \textit{at} 972, 148 Cal. Rptr. \textit{at} 381.} in question. It is thus arguable that the court considered the classification of property to be irrelevant.\footnote{Hetland, \textit{supra} note 11, at 41 (arguing that this language represents a deliberate attempt on the part of the court to make the opinion applicable to all types of property).} Supporting this reading of the decision is the \textit{Wellenkamp} court’s reliance on \textit{Tucker}, which involved commercial property.\footnote{\textit{Id.} The property in \textit{Tucker} was a non-owner occupied single rental unit.}

However, in setting forth the reason why assumption of the loan at an increased rate of interest imposes a significant restraint on the seller, the court engaged in a distinction between residential and commercial property. The \textit{Wellenkamp} court reasoned that in the assumption situation the seller is forced to lower the purchase price and absorb the loss
with a resulting reduction in his equity interest.\textsuperscript{129} The court noted that this result contravenes state policy embodied in Health and Safety Code Section 50007 in favor of protecting home equities.\textsuperscript{130} This policy is not at issue with investment property.

The court's lack of clarity as to the effect of \textit{Wellenkamp} on non-residential property can only inject confusion into the law of real estate financing. This uncertainty causes disadvantage to the borrower, the purchaser, and the lender. In \textit{Medovoi v. American Savings and Loan Association},\textsuperscript{131} the supreme court was presented with the opportunity to determine the applicability of the \textit{Wellenkamp} decision to non-residential property. The court avoided resolution of this issue, however. \textit{Medovoi} was appealed at the same time as was \textit{Wellenkamp}. Rather than hear \textit{Medovoi}, the supreme court remanded it to the court of appeal for reconsideration in light of \textit{Wellenkamp}.

In \textit{Medovoi} the subject property was a six-unit apartment complex. The court of appeal, after summarizing the rather complex factual situation, held that \textit{Wellenkamp} was inapplicable.\textsuperscript{132} In so holding both the majority and the concurrence sharply criticised the \textit{Wellenkamp} decision and its rationale. The plaintiff appealed once again to the supreme court. The court refused to hear the case, and certified it for non-publication.

It is not clear why the supreme court chose not to hear this case. There are at least four plausible explanations. First, the court may not be ready to decide whether or not it should draw a distinction between residential and non-residential property. Alternatively, the court may be willing to extend \textit{Wellenkamp} to commercial property but was unwilling to do so in \textit{Medovoi} because the equities were clearly in favor of the lender.\textsuperscript{133} Third, the holding in \textit{Medovoi} is quite narrow.\textsuperscript{134} The unique fact situation presented in that case will probably never re-oc-

\textsuperscript{129} 21 Cal. 3d at 950, 582 P.2d at 975, 148 Cal. Rptr. at 384.
\textsuperscript{130} \textit{Id.} at 950 n.6, 582 P.2d at 975 n.6, 148 Cal. Rptr. at 384 n.6.
\textsuperscript{131} 89 Cal. App. 3d 244, 152 Cal. Rptr. 572 (certified for non-publication Apr. 19, 1979).
\textsuperscript{132} \textit{Id.} at 258-59, 152 Cal. Rptr. at 581.
\textsuperscript{133} There was evidence presented that the purchaser, Medovoi, and the second trust deed holder colluded in order to keep knowledge of the transfer from the lender. Medovoi fell behind on the mortgage payments, and soon thereafter, he defaulted.
\textsuperscript{134} Summing up his holding in \textit{Medovoi}, Justice Hanson stated:

\begin{quote}
Accordingly, we conclude that where, as in the case at bench, there was an involuntary transfer of a multi-unit apartment property to a non-assuming transferee, who took legal title merely for the purpose of sale to a transferee who would assume the loan, where no notice of the transfer was given and the transferee thereafter refused to assume, a foreclosure thereupon was instituted and the purchaser abandoned the property, that \textit{Wellenkamp} is inapplicable.
\end{quote}

\textsuperscript{89} Cal. App. 3d at 258-59, 152 Cal. Rptr. at 581.
cur. Accordingly, the supreme court may have decided that review was not only unnecessary but unwise, because a ruling in Medovoi could generate even further confusion over the scope of Wellenkamp. Finally, the supreme court may have agreed with the rationale of the court of appeal, but determined that publication of the attacks leveled at the Wellenkamp opinion would not be in the interests of judicial harmony.

The court could have avoided these problems by hearing Medovoi with Wellenkamp, rather than remanding it to the court of appeal. Even had the supreme court held that commercial property is subject to the Wellenkamp restrictions, the trial court, on rehearing, could have found that the Medovoi acceleration was reasonable.

When the supreme court finally rules on this question, it must look beyond the language and rationale of Wellenkamp. Several important considerations indicate that Wellenkamp should not apply to non-residential property. Three were discussed by Justice Hanson in his unpublished Medovoi opinion. First, the policy of protecting homeowner’s equity has no application to non-residential property. Second, the legislature has repeatedly singled out owner-occupied homes or dwellings of four units or less for special protection. This indicates a legislative determination that special protection is necessary only for such residential units. Third, the quantum of restraint with regard to investment property is significantly less. Sellers of commercial real estate are in a better position to make a decision to sell for economic rather than personal reasons. They, therefore, can afford to wait for a favorable lending environment before making a sale.

Further justifying limiting Wellenkamp to residential property, the court in Wellenkamp strongly attacked the injustice caused by a lender placing the burden of its mistaken economic projections on innocent property owners. A seller of commercial property is in the business of making such sales. As such, it is likely that he has just as much knowledge of current market conditions as does the lender. The argument that the lender should bear the risks inherent in an inflationary economy loses some of its force. Also, because the lender and the borrower have no gross inequality of bargaining position, the deed of trust is less likely to be a contract of adhesion.

135. See text accompanying notes 129-30 supra.
136. 21 Cal. 3d at 953, 582 P.2d at 976, 148 Cal. Rptr. at 385.
137. Goodman, supra note 11, at 40.
138. See MCA, Inc. v. Universal Diversified Enterprises Corp., 27 Cal. App. 3d 170, 103 Cal. Rptr. 522 (1972) (trust deeds, although standard form contracts, were not contracts of
Finally, California's anti-deficiency legislation does not apply to deeds of trust executed to secure non-residential, non-owner occupied property. When lending money in a situation in which the lender might be able to obtain a deficiency judgment against the borrower, the borrower's credit is crucial. Any transfer by the borrower to someone who has not been evaluated by the lender creates an automatic impairment of security.

For the foregoing reasons, the California Supreme Court should limit the application of Wellenkamp to residential property. In any event, the court should resolve this needless ambiguity in the law.

E. Federal Preemption: Are Federal Savings and Loans Required to Follow Wellenkamp?

Shortly after Wellenkamp was decided, the United States District Court for the Central District of California held that the validity of due-on-sale clauses contained in loan agreements executed by federally chartered savings and loan associations is governed exclusively by federal law. This applies, at least, to agreements entered into after June 8, 1976. Thus federally chartered savings and loans may be unaffected by the Wellenkamp decision.

1. When does federal preemption occur?

Federal preemption of state law derives from the supremacy clause of the United States Constitution. If Congress has legislatively exercised its granted powers, then operation of state law in the same area is

adhesion, as there was no great disparity of bargaining power between borrower and lender).

139. CAL. CIV. PROC. CODE § 580b (West 1976) provides, in pertinent part:
No deficiency judgment shall lie in any event . . . under a deed of trust, or mortgage, on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling occupied entirely or in part, by the purchaser. (emphasis added).


141. See notes 154-68 infra and accompanying text for a discussion of the applicability of Wellenkamp to agreements entered into before this date.

142. A federal savings and loan association is one chartered by the Federal Home Loan Bank Board. 12 C.F.R. § 541.2 (1979). It is identified by the inclusion of the words "Federal Savings and Loan Association" in its corporate title. See 12 C.F.R. § 543.1(a) (1979).

143. U.S. CONST. art. VI, § 2 provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary, Notwithstanding."
Generally, preemption occurs when there is a specifically applicable federal regulation, or when Congress has indicated an intent to preempt the field. Such intent is manifested when the scheme of federal regulation is so pervasive that the reasonable inference is that Congress left no room for state law to supplement it, or if there is federal regulation in the general area and the nature of the field mandates uniform national rules.

2. Federal preemption and the due-on-sale clause

Congress authorized creation of federally chartered savings and loan associations in the Home Owners Loan Act of 1933. The Act set up an administrative agency, the Federal Home Loan Bank Board (Bank Board) to prescribe regulations governing the creation and administration of these institutions.

In 1976, the Bank Board passed three regulations which address due-on-sale clauses. Exercise of the clause is permitted, unless the event triggering acceleration falls into one of a limited number of exceptions. Waiving acceleration in return for an assumption of the

---

145. Comment, The Due-On Clause: A Preemption Controversy, 10 Loy. L.A.L. Rev. 629, 631 (1977) [hereinafter cited as A Preemption Controversy]. It was concluded that courts will generally find preemption when either of these two factors is present.
147. 12 U.S.C. § 1464(a) (1976) provides:
In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board [Federal Home Loan Bank Board] is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as “Federal Savings and Loan Associations,” and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States.
148. 12 C.F.R. §§ 545.6-11(f) and (g), § 556.9 (1979). These regulations were effective as of June 8, 1976.
149. 12 C.F.R. § 545.6-11(f) (1979). In pertinent part, this regulation states:
A Federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of the 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 borrower without the association’s prior written consent. Except as provided in paragraph (g) of this section . . . exercise by an association of such an acceleration option (hereafter called a due-on-sale clause) shall be governed exclusively by the terms of the contract between the association and the borrower . . .
150. 12 C.F.R. § 545.6-11(g)(i) (1979) provides:
With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise a due-on-sale clause based on any of the following:
existing loan at an increased rate of interest is expressly sanctioned.\textsuperscript{151}

The \textit{Wellenkamp} holding is inconsistent with the federal regulations. In \textit{Glendale Federal Savings and Loan Association v. Fox},\textsuperscript{152} the court restated the accepted principle that when there is a specific federal law covering a subject matter, inconsistent state law must yield. Therefore, the court held that the federal regulations rather than the \textit{Wellenkamp} rule controlled loans made by federal savings and loans.\textsuperscript{153}

\textit{Fox} expressly left open the question of whether state or federal law governs due-on-sale clauses in loans executed prior to June 8, 1976, the effective date of the regulations.\textsuperscript{154} It is important to address this question because the \textit{Fox} preemption ruling has a significantly greater impact if applied to loans made before the regulations went into effect.

Preemption exists if, in passing the Home Owners Loan Act, Congress intended to preclude the states from legislating with regard to federal savings and loans. Courts have not agreed as to whether or not such intention existed. In \textit{Meyers v. Beverly Hills Federal Savings and Loan Association},\textsuperscript{155} the plaintiff contended that certain prepayment penalty provisions in deeds of trust executed by federally chartered savings and loans were void under California law. While basing its dismissal of the action on the grounds that there were Bank Board regulations governing such provisions, the Ninth Circuit Court of Appeals suggested in dictum that state law would not apply even absent these specific federal regulations.\textsuperscript{156} At least two other circuits have

\begin{itemize}
\item[(i)] Creation of a lien or other encumbrance subordinate to the association’s security instrument;
\item[(ii)] Creation of a purchase money security interest for household appliances;
\item[(iii)] Transfer by devise, descent, or by operation of law upon the death of a joint tenant;
\item[(iv)] Grant of any leasehold interest of three years or less not containing an option to purchase.
\end{itemize}

\textsuperscript{151} 12 C.F.R. § 556.9(d) (1979) states that “[s]ection 545.6-11(g)(3) of this subchapter authorizes Federal associations to increase the interest rate as a condition of loan assumption.”


\textsuperscript{153} The court stated that “[t]he regulations \textit{on their face} indicate the Bank Board’s intent to exercise the authority to preempt delegated to it by Congress and to govern exclusively the validity and exercisability of due-on-sale clauses in the lending instruments of federal associations.” \textit{Id.} at 911 (emphasis added).

\textsuperscript{154} \textit{Id.} at 911 n.12.

\textsuperscript{155} 499 F.2d 1145 (9th Cir. 1974).

\textsuperscript{156} The court stated that “[p]ursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association ‘from its cradle to its corporate grave.’” \textit{Id.} at 1146-47 (citations omitted).
indicated agreement with this position. However, in *Derenco, Inc. v. Benjamin Franklin Federal Savings and Loan Association*, the Oregon Supreme Court held that in the absence of Bank Board regulations in the particular area at issue, federally chartered savings and loans are subject to state law. The court reasoned that the field involving federal savings and loans is not one requiring uniformity of decision so as to mandate exclusive use of federal law. Because the United States Supreme Court denied certiorari in *Derenco*, this issue remains unresolved.

The Supreme Court has disfavored applying legislation retroactively, absent express provision or clear implication in a statute or regulation. However, the language in the Bank Board's due-on-sale regulations strongly suggests an intent to preempt the area. In the preamble to the regulations, the Board maintained that "[i]t was and is the Board's intent to have . . . due-on-sale practices governed exclusively by federal law." The regulation authorizing use of the due-on-sale provision provides that "[a] Federal Association continues to have the power to include . . . [an acceleration provision]." This indicates

---

157. Kupiec v. Republic Fed. Sav. & Loan Ass'n, 512 F.2d 147, 150 (7th Cir. 1975); Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 422 F.2d 504 (8th Cir. 1970).
159. *Derenco* concerned an Oregon law allowing borrowers to demand an accounting of profits allegedly realized on reserve accounts.
160. 281 Or. at 549, 577 P.2d at 487-88.
161. The United States Supreme Court recently decided its first case concerning preemption with regard to federal savings and loan associations. In *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256 (9th Cir. 1979), aff'd, 100 S. Ct. 1304 (1980), the Court summarily affirmed a decision by the Ninth Circuit Court of Appeals that the power to regulate federal savings and loans is vested exclusively in the Federal Home Loan Bank Board. The Ninth Circuit thus held that the Secretary of the Business and Transportation Agency of California was without authority to enforce California's anti-redlining statutes, CAL. HEALTH & SAFETY CODE §§ 35800-35833 (West 1976) against federal savings and loans. 604 F.2d at 1257. *Stein*, however, does not answer the question left open in *Fox*. The *Stein* court was careful to draw a distinction between the "substantive" and the "procedural" aspects of the Home Owners Loan Act. *Id.* at 1260. The court stressed the fact that it was not deciding whether or not the California anti-redlining statutes themselves were enforceable against federal savings and loans. Rather, the court stated, the only issue was "the regulatory authority of [the Secretary of Business and Transportation] over the federal associations." *Id.* The court held that "[i]f state-conferred rights are to be enforced against the federal associations by any regulatory body, (a question we do not now reach), enforcement must be by the Bank Board." *Id.* (emphasis added). Because the rights conferred in *Wellenkamp* are "substantive" rather than "procedural", and because enforcement of these rights is entrusted to the courts rather than to a state administrative agency, *Stein* is not on point.
163. Preamble to Bank Board Resolution No. 76-296, April 28, 1976 (emphasis added).
164. 12 C.F.R. § 545.6-11(f) (1979). *See* note 149 *supra*. 
that the right to include such clauses always existed.\textsuperscript{165} Moreover, the regulations prohibit imposition of prepayment charges upon exercise of a due-on-sale clause “only with regard to loans made upon borrower-occupied homes after July 31, 1976.”\textsuperscript{166} Use of such provisions prior to that date is left to the lender’s discretion. The logical inference is that as the prepayment charges were valid before July, 1976, and because they are used in conjunction with the due-on-sale clause, the due-on-sale clause must also have been acceptable.\textsuperscript{167} Additionally, as there are varying state interpretations of the due-on-sale clause, deference to state law on the subject would result in a decisive lack of uniform national policy.\textsuperscript{168}

It appears that due-on-sale clauses in agreements executed by federal savings and loans are governed exclusively by federal law, regardless of when the contract was signed. The inconsistency between federal law and state law regarding due-on-sale clauses creates certain difficulties. It is unfair to permit the validity of a loan provision to depend upon the source of the lender’s charter,\textsuperscript{169} rather than on the nature of the agreement. Moreover, this dichotomy opens up the door to a flurry of conversions from state to federal charters in order to avoid the impact of \textit{Wellenkamp}.\textsuperscript{170}

In light of the difficulties caused by the application of the preemption doctrine to due-on-sale clauses, it would be advisable for the Bank Board to repeal these regulations and provide instead that due-on-sale provisions in loans executed by federal associations are to be governed by the law of the state in which the property is located.

\textbf{F. Result of the Wellenkamp Decision: Increased Use of the Variable Rate Mortgage?}

As a result of the \textit{Wellenkamp} holding, lenders have to utilize means other than the due-on-sale clause to maintain their loan portfolios at current rates of interest. The variable rate mortgage serves as

\textsuperscript{165} A Preemption Controversy, supra note 145, at 632-33.

\textsuperscript{166} 12 C.F.R. § 556.9(b)(1) (1979).

\textsuperscript{167} A Preemption Controversy, supra note 145, at 633.

\textsuperscript{168} Id. at 642-43.

\textsuperscript{169} Hetland, \textit{After Wellenkamp} (pt.3), \textit{CAL. REAL ESTATE MAGAZINE} 16, 18 (Feb. 1979). Professor Hetland stated that national \textit{banks}, as opposed to savings and loans, are subject to state law regarding loans secured by real property. \textit{Id.} at 17.

\textsuperscript{170} \textit{CAL. FIN. CODE} § 9250 (West 1976) permits a state chartered savings and loan association to convert itself into a federal savings and loan if certain procedures, outlined in §§ 9251-9256, are followed.
another vehicle to this end. According to the Wellenkamp majority, the variable rate mortgage is an "attractive and viable alternative" to the due-on-sale provision.

A variable rate mortgage is a mortgage with an interest rate which varies according to fluxes in economic conditions. Such variation may effect either an increase or decrease in the interest rate. In the event of an increase, the borrower generally has the option of extending the loan for any additional period necessary to amortize the loan, while continuing at the rate of the existing monthly payments. The variable rate mortgage was authorized by the California legislature in 1972. Its use, however, is subject to very strict limitations.

Numerous arguments are advanced in favor of the variable rate mortgage. Price level fluctuations are difficult if not impossible to predict over any great length of time. As a result, in a long-term loan, the borrower benefits at the expense of the lender if levels rise. The reverse is not true, however, if levels fall. In this situation, the borrower

171. Other possibilities include graduated payment mortgages, where the ratio of principal to interest decreases over the life of the loan, and short term (two years or less) fixed interest loans, where the borrower has the option to renew at the end of the term at the current rate of interest. Goodman, supra note 11, at 41.

172. 21 Cal. 3d at 952 n.10, 582 P.2d at 976 n.10, 148 Cal. Rptr. at 385 n.10.


174. Rate adjustment in the variable rate mortgage is tied to current economic conditions. The rate of any increase or decrease is determined by an index which reflects the cost of money to the lender at any given time. Comment, Adjustable Interest Rates in Home Mortgages: A Reconsideration, 1975 WIS. L. REV. 742, 761. Many such indices are possible. Savings and loan associations issuing variable rate mortgages under CAL. CIV. CODE § 1916.5 (West Supp. 1978) (see notes 175-76 infra and accompanying text) are required to use as an index "the last published weighted average cost of savings, borrowings and federal Home Loan Bank advances to California members of the Federal Home Loan Bank of San Francisco as computed from statistics tabulated by the Federal Home Loan Bank of San Francisco." CAL. ADM. CODE, tit. 10 § 240.2(a)(1) (1979).


176. Section 1916.5(a)(6) requires "a statement attached to the security document and to any evidence of debt issued in connection therewith printed or written in a size equal to at least 10-point bold type, consisting of the following language: NOTICE TO THE BORROWER: THIS DOCUMENT CONTAINS PROVISIONS FOR A VARIABLE INTEREST RATE." Section 1916.5(a)(2) provides that "[t]he rate of interest shall change not more often than once during any semiannual period, and at least six months shall elapse between any two such changes." Section 1916.5(a)(3) provides that "[t]he change in the interest rate shall not exceed one-fourth of 1 percent in any semiannual period, and shall not result in a rate more than 2.5 percentage points greater than the rate for the first loan payment due after the closing of the loan." In addition, section 1916.5(a)(5) requires that "[t]he borrower [be] permitted to prepay the loan in whole or in part without a prepayment charge within 90 days of notification of any increase in the rate of interest." (emphasis added).

can refinance at the lower rate of interest and pay off the existing loan.\textsuperscript{178} With the variable rate mortgage, the lender is assured that interest will be paid at the current rate\textsuperscript{179} and the borrower required to obtain money during a period of inflation is not locked into paying a higher rate than one who borrows when economic conditions are more favorable.\textsuperscript{180}

It is also argued that variable rates provide even greater protection to the lender than due-on-sale clauses. Due-on-sale provisions, even if presumed valid, are only activated in the event of a sale. Variable rates, however, fluctuate according to changes in economic conditions. Thus, variable rate mortgages are a desirable method of ensuring that loan portfolios reflect the true cost of borrowing and of facilitating a steady infusion of new funds into the housing market.\textsuperscript{181}

Close scrutiny of variable rate mortgages reveals potentially serious problems in their use as an alternative to due-on-sale clauses. Most of the arguments advanced in favor of the variable rate mortgage are the so-called "portfolio" arguments. Yet the \textit{Wellenkamp} court expressly stated that such considerations do not justify exercise of the due-on-sale clause.\textsuperscript{182} Consistency would dictate that economic factors are either a justifiable purpose behind provisions contained in loan agreements or they are not. There is no reason for distinguishing between due-on-sale provisions and variable rate mortgages on this ground.

After \textit{Wellenkamp} it is likely that variable rate mortgages will be included routinely in deeds of trust. Yet surveys indicate that most

\begin{itemize}
\item \textsuperscript{178} \textit{Id.} McManus noted that if rates drop, and the borrower does not choose to refinance, then the debt will be disproportionate to the value of the asset.
\item \textsuperscript{179} But query whether this advantage is lessened by provisions, such as section 1916.5(e), which allow the borrower to continue to pay the lower rate by extending the life of the loan.
\item \textsuperscript{180} Note, \textit{The Demise of the Due-On-Sale Clause}, 64 CALIF. L. REV. 573, 599 (1976). The author argued that the advantage to the variable rate mortgage is that at any given time, the interest paid on the loan reflects the current market rate.
\item \textsuperscript{181} Comment, \textit{The Variable Interest Rate Clause And Its Use In California Real Estate Transactions}, 19 U.C.L.A. L. REV. 468, 473 (1972). The author noted that another disadvantage to the fixed long-term loan, at least when the loan is made by a savings and loan association, is that the fixed return limits the amount that can be paid out to depositors. Under a variable rate loan, the higher interest payments made by long term borrowers in times of inflation generate increased funds for depositors. In a period of deflation, the interest payments are less. However, the lender does not suffer, as it does not need to pay as high an interest rate to attract new savers. \textit{Id. at} 471.
\item \textsuperscript{182} 21 Cal. 3d at 953, 582 P.2d at 976-77, 148 Cal. Rptr. at 385-86.
\end{itemize}
prospective homebuyers are opposed to variable mortgages. Many such buyers consider a fixed home mortgage to be advantageous. The advantage seen in the fixed rate is that in times of inflation payments remain the same, while during a recession a homeowner is afforded the opportunity to refinance at a lower rate. Opposition to variable mortgages might stem from a fear that the practical effect of such mortgages will be a continuous rise in rates, insofar as a recession is unlikely. It is worth noting that these borrower concerns are somewhat exaggerated, given that variable rate mortgages fluctuate very little. The California Civil Code prohibits any change in the interest rate greater than "one-fourth of 1 percent in any semiannual period."

Unless borrowers' attitudes change, however, variable rate mortgages are likely to be challenged in court. Will these provisions then be struck down on either a contract of adhesion theory, or on the basis of furthering a "public policy" of protecting the consumer against large institutions? If these challenges are successful, then a decreased flow of funds will result, causing the mortgage market to dry up.

Apart from these theoretical issues, there are two other difficulties caused by substituting variable rate mortgages for due-on-sale clauses. First, variable rates are permitted only for purchase money loans secured by specified residential property. As was indicated earlier, it is unclear whether or not Wellenkamp is so limited. This strongly suggests that if variable mortgages are to be a workable alternative,

---

183. For a discussion of one such survey which revealed an 82% opposition rate, see Kratovil, supra note 3, at 313.
184. Comment, Adjustable Interest Rates in Home Mortgages: A Reconsideration, 1975 Wis. L. Rev. 742, 745-47. The author indicated that another factor which causes borrower opposition is that the increase in land values in times of inflation does not result in realizable income to the borrower. Thus, the borrower may not be able to meet the higher interest payments.
185. Kratovil maintained that this fear is well-founded. He reasoned that if two purchasers signed agreements in 1950, one under a fixed rate and one under the VRM, the latter would be paying 2½ times as much interest today. Kratovil, supra note 3, at 313.
186. Cal. Civ. Code § 1916.5(a)(3) (West Supp. 1978). In addition, the Code provides that the interest demanded "shall [never] result in a rate more than 2.5 percentage points greater than the rate for the first loan payment due after the closing of the loan." Id.
187. Cal. Civ. Code § 1916.5(b) (West Supp. 1978) provides: The provisions of this section shall be applicable only to a mortgage contract, deed of trust, real estate sales contract, or any note or negotiable instrument issued in connection therewith, when its purpose is to finance the purchase or construction of real property containing four or fewer residential units or on which four or fewer residential units are to be constructed. (emphasis added).
188. See text accompanying notes 125-39 supra.
then they must be permitted with regard to any property covered by the Wellenkamp holding.

Second, the variable rate mortgage was impermissible in California prior to 1972. The Wellenkamp holding, however, has a partially retroactive effect, extending to all due-on-sale clauses not yet enforced. Many mortgage agreements with due-on-sale provisions were entered into before the authorization of variable rate mortgages. The effect of the Wellenkamp decision on lenders is alleviated only partially by use of the variable rate mortgage. The court, therefore, should have considered limiting the retroactivity of Wellenkamp to loans executed after 1972.

V. CONCLUSION

Due-on-sale clauses are legitimate means by which lenders are able to keep loan portfolios at current rates of interest. By an improper reading of precedent and a misuse of the restraints on alienation theory, the California Supreme Court has attempted to prohibit such use. Provisions like the due-on-sale clause are always subject to potential abuse. It has been suggested, however, that such abuses are best corrected on a case by case basis, rather than by the inflexible Wellenkamp rule.

The impact of Wellenkamp will likely be minimal. Federally chartered savings and loan associations and non-institutional lenders appear to be exempt from the decision. Furthermore, Wellenkamp may be inapplicable to loans securing non-residential real property. Finally, devices such as the variable rate mortgage provide a different means for lenders to reach the same end. Should the real estate financing industry escape unscathed, however, Wellenkamp remains a painful reminder of the inordinate power lodged in the courts to bend the law to reach what they determine is a desirable result.

Lynne McGinnis

189. 21 Cal. 3d at 954, 582 P.2d at 977, 148 Cal. Rptr. at 386.