



9-1-1976

The Due-on-Sale Clause as a Reasonable Restraint on Alienation - A Proposal for Texas.

Connie B. Leonis

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [State and Local Government Law Commons](#)

Recommended Citation

Connie B. Leonis, *The Due-on-Sale Clause as a Reasonable Restraint on Alienation - A Proposal for Texas.*, 8 ST. MARY'S L.J. (1976).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol8/iss3/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

THE DUE-ON-SALE CLAUSE AS A REASONABLE RESTRAINT ON ALIENATION—A PROPOSAL FOR TEXAS

CONNIE B. LEONIS

In recent years, lenders, especially savings and loan associations, have begun to include due-on-sale clauses in their mortgage contracts or deeds of trust.¹ These clauses provide for acceleration of the balance due on the note if the mortgagor conveys the property without the prior written consent of the lender.² This provision enables the lender to protect his security interest by requiring prior approval of the prospective buyer before an assumption of the note and mortgage.³ Additionally, it provides an opportunity to raise the interest rate on a note to the current market rate since the mortgagee may agree to waive his right to accelerate only if the buyer agrees to a higher interest rate.⁴

Those representing the mortgagor and buyer have, however, insisted that the exercise of the clause operates as a restraint on the alienation of the property.⁵ The sellers of property subject to a due-on-sale mortgage believe that when prospective buyers discover that they cannot assume the loan at a rate lower than the prevailing one, they are no longer interested in purchasing the property. While a case directly presenting this argument has not yet come before the Texas courts, a number of other jurisdictions have confronted the issue.⁶ Several positions have emerged, but an analysis reveals the majority position to be the best and the one that Texas should adopt, particularly if the clause is so worded as to be fair to both lenders and borrowers.

ANALYZING THE "DUE-ON-SALE" CLAUSE

An acceleration clause is a provision in a promissory note, mortgage

1. See *Cherry v. Home Sav. & Loan Ass'n*, 81 Cal. Rptr. 135, 138 (Dist. Ct. App. 1969) (acknowledging frequent use of due-on-sale clauses).

2. For examples of due-on clauses, see *id.* at 136; *Baker v. Loves Park Sav. & Loan Ass'n*, 333 N.E.2d 1, 2 (Ill. 1975); *People's Sav. Ass'n v. Standard Indus., Inc.*, 257 N.E.2d 406, 407 (Ohio Ct. App. 1970).

3. See *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 481 S.W.2d 725, 729 (Ark. 1972) (giving examples of objectionable transfers).

4. See Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests*, 58 IOWA L. REV. 747, 769 (1973).

5. *E.g.*, *Coast Bank v. Minderhout*, 38 Cal. Rptr. 505, 507-08 (1964); *Pellerito v. Weber*, 177 N.W.2d 236, 237 (Mich. Ct. App. 1970); *Sanders v. Hicks*, 317 So. 2d 61, 62-63 (Miss. 1975).

6. *E.g.*, *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 193 (Ariz. Ct. App. 1971); *Clark v. Lachenmeier*, 237 So. 2d 583, 584-85 (Fla. Dist. Ct. App. 1970); *Gunther v. White*, 489 S.W.2d 529 (Tenn. 1973).

contract, or deed of trust giving the holder, mortgagee, or beneficiary the option to declare the amount due and immediately payable if the maker, mortgagor, or grantor defaults in any manner.⁷ Defaults include the nonpayment of interest or principal installments, taxes, or insurance premiums; the failure to keep the property in repair; and a breach of a covenant in the note or mortgage agreement.⁸ It is well settled that acceleration clauses are valid and enforceable.⁹

A "due-on-sale" clause in a mortgage or deed of trust provides for the acceleration of the maturity of the debt upon the sale of the property by the mortgagor without the prior consent of the mortgagee.¹⁰ While some of these provisions are restricted to the sale of the property, others provide for acceleration upon the sale, transfer, or further encumbrance of the property, in whole or in part, or of any interest therein.¹¹ The term "due-on clause" is

7. 4 AMERICAN LAW OF PROPERTY § 16.193, at 463 (A. Casner ed. 1952).

8. *Id.* § 16.193, at 463. The Texas Bar suggests

[t]hat in the event of default in the payment of any installment, principal or interest, of the note hereby secured, in accordance with the terms thereof, or of a breach of any of the covenants herein contained to be performed by Grantors, then and in any of such events Beneficiary may elect . . . to declare the entire principal indebtedness hereby secured with all interest accrued thereon . . . immediately due and payable

STATE BAR OF TEXAS, LEGAL FORM MANUAL FOR REAL ESTATE TRANSACTIONS § 7, at 7A (1976).

9. *See, e.g., Chicago & Vincennes R.R. v. Fosdick*, 106 U.S. 47, 67 (1882); *Weierhauser v. Bennett*, 19 S.W.2d 572, 573 (Tex. Civ. App.—San Antonio 1929, no writ); *Clark v. Elmendorf*, 78 S.W. 538, 539 (Tex. Civ. App. 1904, writ ref'd). *See generally* 55 AM. JUR. 2d *Mortgages* § 371, at 421 (1971).

10. Each clause must be examined to determine what types of transactions will enable the mortgagee to exercise his option. The clause in *Clark v. Lachenmeier*, 237 So. 2d 583, 584 (Fla. Dist. Ct. App. 1970) applied only to a transfer of ownership: "[I]n the event of transfer of ownership of the above described property . . . the Mortgagee has the right and privilege of accepting or rejecting, or passing on credit, etc. of such successor in ownership." This seems, therefore, to include a sale, gift, or contract to sell the property.

11. The clause in *Tucker v. Lassen Sav. & Loan Ass'n*, 116 Cal. Rptr. 633, 635 n.3 (1974), provided for acceleration if "the Trustor shall sell, convey, or alienate, or further encumber said property, or any part thereof, or any interest therein . . ." This clause includes many possible transactions: a sale or gift of the property, or any interest in the property such as an undivided one-half interest, or mineral rights in the property (transfer of ownership or title), a land sale contract, lease or life estate (generally involving a transfer of possession but not legal title), or a secondary mortgage (no transfer of ownership, title or, possession, but the retention of a security interest in the property by the mortgagee). The property owners in *Tucker* did execute a land sale contract to the couple who had been leasing the property for nine months, and the savings and loan exercised its option to declare the note due. The court pointed out that if the clause were valid, the mortgagee could have exercised its option when the mortgagor leased the property. *Id.* at 635. This particular clause is broader than a due-on-sale clause as it includes transactions in addition to the sale of the property.

Clauses similar to the due-on clause in *Tucker* were employed in the following cases: *La Sala v. American Sav. & Loan Ass'n*, 97 Cal. Rptr. 849, 851 (1971) (en banc) ("sell, convey, transfer, dispose of or further encumber said property, or any part thereof, or any interest therein, or agree to do so . . .") and *Cherry v. Home Sav. & Loan Ass'n*,

used, therefore, to refer to all clauses providing for acceleration upon any transfer of the property, including a sale.

The inclusion of a due-on clause has become more frequent in recent years.¹² The purpose of the clause is two-fold. First, it provides a means of controlling the person in possession of the property. When the mortgagor sells his home to another individual, the mortgagee may examine the buyer and determine whether he is a safe risk. If the lender feels that the buyer's credit rating is poor or that he is of disreputable or unstable character, the lender can "call" the loan due and prevent the possibility of having his security interest jeopardized. A second function of the due-on-sale clause is to enable the lender to maintain his loan portfolio at the current market rates.¹³ When a sale is contemplated, the lender can offer to waive his right to accelerate only upon the condition that the buyer agrees to assume the loan at a higher rate of interest. This second reason for exercising the clause has taken on importance in recent years as a result of the sharp rise in interest rates on home mortgages.¹⁴

The borrower may seek to avoid the effect of the exercise of the clause, however, and sometimes asserts a general claim that the clause is void and unenforceable,¹⁵ inequitable, unfair, or against public policy.¹⁶ Most parties objecting to the clause plead that the due-on-sale clause represents a restraint on alienation.¹⁷ The mortgagor argues that since he has no guarantee that his prospective buyer will be permitted to assume the loan at its existing,

81 Cal. Rptr. 135, 136 (Dist. Ct. App. 1969) ("sell, convey or alienate said property, or any part thereof, or any interest therein . . ."). The clause utilized in *Sanders v. Hicks*, 317 So. 2d 61, 62-63 (Miss. 1975) ("the within property shall not be sold or encumbered without the express written consent of the within mortgagees . . ."), is more limited as it does not contain the phrase "or any interest therein." This implies it should not apply to a transfer such as a gift.

12. Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests*, 58 IOWA L. REV. 747, 769 (1973).

13. See Note, 11 CAL. W.L. REV. 578, 590 (1975).

14. See Bonanno, *Due on Sale and Prepayment Clauses in Real Estate Financing in California in Times of Fluctuating Interest Rates—Legal Issues and Alternatives*, 6 U.S.F.L. REV. 267, 267-68 n.2 (1972); Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests*, 58 IOWA L. REV. 747, 797 (1973).

15. *E.g.*, *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 481 S.W.2d 725, 726 (Ark. 1972) (borrower claiming clause void); *Baker v. Loves Park Sav. & Loan Ass'n*, 333 N.E.2d 1, 3 (Ill. 1975) (borrower claiming clause invalid); *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 583 (N.C. 1976) (borrower claiming clause void).

16. *E.g.*, *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 192 (Ariz. Ct. App. 1971) (clause void as against public policy); *People's Sav. Ass'n v. Standard Indus., Inc.*, 257 N.E.2d 406, 407 (Ohio Ct. App. 1970) (clause illegal, inequitable, and contrary to public policy); *Gunther v. White*, 489 S.W.2d 529 (Tenn. 1973) (clause in restraint of trade and against public policy).

17. *E.g.*, *Coast Bank v. Minderhout*, 38 Cal. Rptr. 505, 507-08 (1964); *Pellerito v. Weber*, 177 N.W.2d 236, 237 (Mich. Ct. App. 1970); *Sanders v. Hicks*, 317 So. 2d 61, 63 (Miss. 1975).

below-market interest rate, he will encounter great difficulties in selling his property.¹⁸

RESTRAINTS ON ALIENATION: BACKGROUND

A provision in an instrument such as a deed, will, deed of trust, or contract which may impair the marketability of the property constitutes a restraint on the alienation of that property.¹⁹ The common law position, a development of English feudal law,²⁰ holds that any absolute restraint on alienation is repugnant to the fee title to land so that any provision creating such a restraint is void.²¹ The power of alienation is considered one of the most important characteristics of ownership of land in fee.²² This strong sentiment against restraining alienation of property developed because of what was believed would result from the enforcement of these restrictions: the removal of property from commerce, the concentration of wealth, the prejudice to the property owners' creditors, and the discouragement of property improvements.²³

Restraints have been categorized in many different ways. There is clearly a distinction between the legal power of alienation and the practical inability to alienate.²⁴ Another means of distinguishing restraints is to determine whether a particular one is direct or indirect. A direct restraint expressly prohibits the alienation of the property or penalizes the exercise of the

18. Normally, the party opposing the savings and loan association is the original mortgagor, who is being sued in foreclosure because he has conveyed without the consent of the mortgagee. *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 191 (Ariz. Ct. App. 1971). Sometimes, however, the buyer, who is being forced to pay a higher interest rate, is the association's adversary. *Cherry v. Home Sav. & Loan Ass'n*, 81 Cal. Rptr. 135, 136 (1969); *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1242 (Colo. 1973) (en banc). Occasionally, the mortgagor sues the lender because a sale was not completed when the prospective buyer discovered he could only assume at a higher rate. *Hellbaum v. Lytton Sav. & Loan Ass'n*, 79 Cal. Rptr. 9, 10 (Dist. Ct. App. 1969).

19. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1111, at 4 (2d ed. 1956).

20. See generally 4A G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 2015 (1961) (general discussion of the development).

21. See, e.g., *Potter v. Couch*, 141 U.S. 296, 315 (1891); *Combs v. Paul*, 133 S.E. 93 (N.C. 1926); *Baker v. Alexander*, 156 N.E. 223, 226 (Ohio Ct. App. 1926); *Diamond v. Rotan*, 124 S.W. 196, 198 (Tex. Civ. App. 1910, writ ref'd).

22. E.g., *Potter v. Couch*, 141 U.S. 296, 315 (1891); *Dunlop v. Dunlop's Ex'rs*, 132 S.E. 351, 354 (Va. 1926); *Gladstone Mountain Mining Co. v. Tweedell*, 232 P. 306, 308 (Wash. 1925).

23. A. CASNER & W. LEACH, *CASES AND TEXT ON PROPERTY* at 1008 (2d ed. 1969).

24. See *Tucker v. Lassen Sav. & Loan Ass'n*, 116 Cal. Rptr. 633, 637 (1974); L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1111, at 3 (2d ed. 1956). For an explanation of an additional method of classification of restraints see Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173 (1959); Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests*, 58 IOWA L. REV. 747, 748 (1973).

power.²⁵ An indirect restraint, in turn, occurs when a clause is not designed to restrain alienation yet works a practical restraint on the alienability of the property.²⁶

Generally, any absolute, direct restraint will be held void.²⁷ There are, however, specific restraints which have come to be accepted as enforceable, even though they clearly restrict the alienation of the property affected.²⁸ The primary rationale for allowing these exceptions is that the objectives sought to be accomplished outweigh the "social evils" which result from their enforcement.²⁹ In making this determination, factors considered include the duration of the restraint, the interest in the property of the party seeking to enforce the restraint, and the effect of enforcement of the restraint as accomplishing a worthwhile purpose.³⁰

THREE APPROACHES TO THE DUE-ON CLAUSE

In recent years, the question of whether the due-on-sale clause constitutes an unreasonable restraint on alienation has come before the courts of a number of jurisdictions,³¹ and three basic views of the problem have developed.

25. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1112, at 4-5 (2d ed. 1956).

26. *Id.* § 1112, at 5.

27. *See, e.g.*, *Potter v. Couch*, 141 U.S. 296, 315 (1891); *Baker v. Alexander*, 156 N.E. 223, 226 (Ohio Ct. App. 1926); *O'Connor v. Thetford*, 174 S.W. 680, 681 (Tex. Civ. App.—San Antonio 1915, writ ref'd); *Diamond v. Rotan*, 124 S.W. 196, 198 (Tex. Civ. App. 1909, writ ref'd); *Dunlop v. Dunlop's Ex'rs*, 132 S.E. 351, 354 (Va. 1926).

28. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1175 (1959). Among these exceptions are the spendthrift trust, restraints on the power to partition, restrictions which limit alienation to a small group of persons, restraints on a life estate or an estate for years, restraints for the protection of vendor in a land sale contract, restraints in the form of a right of preemption, restraints on the sale of stock in business organizations and restraints on gifts to charity. *Id.* at 1175.

29. RESTATEMENT OF PROPERTY § 410, Comment a, at 2429 (1944).

30. *Id.* § 406, Comment i, at 2406-07 (1944). A traditional justification for a restraint is the spendthrift trust for a widow, arranged so that she will have undiminished income throughout her life. *See Simonton v. White*, 93 Tex. 50, 57, 53 S.W. 339, 341 (1899).

31. Cases cited notes 5 & 6 *supra*. There is, however, no Texas case in point. Some cases, while involving the same situation of a lender seeking to enforce a due-on clause, have not dealt with the restraint problem but have approached the issue from the perspective of public policy and equity. *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 193 (Ariz. Ct. App. 1971); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 481 S.W.2d 725, 729 (Ark. 1972); *Clark v. Lachenmeier*, 237 So. 2d 583, 584 (Fla. Dist. Ct. App. 1970). All of these cases involving a due-on clause have been discussed and analyzed at great length in numerous articles. Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests*, 58 IOWA L. REV. 747 (1973); Comment, *Mortgages—A Catalogue and Critique on the Role of Equity in the Enforcement of Modern-Day "Due-On-Sale" Clauses*, 26 ARK. L. REV. 485 (1973); Note, *Transfer Fees in Home Loan Assumptions: Illegal Interest or Legal Consideration?*, 9 GA. L. REV. 454 (1975); Note, *Mortgages: Restrictions on Transfer of the Fee—Effect of Due-on-*

The majority position is that the exercise of the due-on-sale clause is valid,³² although various approaches have been taken in reaching that result.³³ Some cases stress the parties' right to make contracts and the court's reluctance to alter contractual terms.³⁴ Other courts have examined the nature of the clause to determine if it constitutes a reasonable restraint and have concluded that it lacks those characteristics that traditionally render restraints on alienation unreasonable and undesirable.³⁵ Also emphasized is the fact that the restraint resulting from the exercise of the clause is not absolute, but indirect; the mortgagor retains the power to dispose of his property.³⁶ Moreover, one court expressed the opinion that mortgagees actually facilitate transfer of property by making money available for loans.³⁷

The view that the due-on clause is valid is also supported by economic and business considerations. Some courts state that the mortgagee's desire to maintain loans at current interest rates is a justifiable and legitimate interest³⁸ since savings and loans are entitled to manage their business in such a way as to maximize their profits.³⁹ Additionally, these lenders must continually raise interest rates to depositors in times of rising interest rates,⁴⁰

Sale Clauses, 28 OKLA. L. REV. 418 (1975); Comment, *Is the Practice of Raising the Interest Rate in Return for Not Exercising an Acceleration Clause on Assumption of a Mortgage Illegal in Texas as a Restraint on Alienation?*, 13 S. TEX. L.J. 296 (1972); Note, *Judicial Treatment of the Due-On-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 STAN. L. REV. 1109 (1975); Comment, *Use of "Due On" Clauses to Gain Collateral Benefits: A Common-Sense Defense*, 10 TULSA L.J. 590 (1975); Note, 11 CAL. W.L. REV. 578 (1975); Note, 22 HASTINGS L.J. 431 (1971); 47 MISS. L.J. 331 (1976).

32. *E.g.*, *Jones v. Sacramento Sav. & Loan Ass'n*, 56 Cal. Rptr. 741, 745 (Dist. Ct. App. 1967); *Shalit v. Investors Sav. & Loan Ass'n*, 244 A.2d 151, 155 (N.J. Super. Ct. 1968); *Stith v. Hudson City Sav. Institution*, 313 N.Y.S.2d 804, 808 (1970).

33. *E.g.*, *Coast Bank v. Minderhout*, 38 Cal. Rptr. 505, 508 (1964) (restraint not unreasonable); *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1243-45 (Colo. 1973) (en banc) (economic and business considerations); *People's Sav. Ass'n v. Standard Indus., Inc.*, 257 N.E.2d 406, 407-08 (Ohio Ct. App. 1970) (agreement with rule established in *Coast Bank*).

34. *Cherry v. Home Sav. & Loan Ass'n*, 81 Cal. Rptr. 135, 139 (Dist. Ct. App. 1969). See *Gunther v. White*, 489 S.W.2d 529, 532 (Tenn. 1973); *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works*, 205 N.W.2d 762, 769 (Wis. 1973).

35. *E.g.*, *Coast Bank v. Minderhout*, 38 Cal. Rptr. 505, 508 (1964); *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 584 (N.C. 1976); *Gunther v. White*, 489 S.W.2d 529, 530 (Tenn. 1973).

36. *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 584 (N.C. 1976). See *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n*, 99 Cal. Rptr. 417, 422 (Dist. Ct. App. 1971) (restraint not absolute); *Gunther v. White*, 489 S.W.2d 529, 530 (Tenn. 1973) (right to sell).

37. *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 585 (N.C. 1976).

38. See *Coast Bank v. Minderhout*, 38 Cal. Rptr. 505, 508 (1964); *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1245 (Colo. 1973) (en banc); *Gunther v. White*, 489 S.W.2d 529, 531 (Tenn. 1973).

39. *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 585 (N.C. 1976).

40. *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1244 (Colo. 1973) (en banc).

while during periods of declining rates, borrowers may refinance at lower rates and repay the loan.⁴¹ Several cases supporting the majority view also point out that equitable principles may always be invoked to protect against unconscionable or inequitable conduct by the lender.⁴²

A smaller number of jurisdictions take the position that while the clause is not void, in order to exercise it the lender must be able to show that there is a genuine threat to the security of the loan, such as the poor credit rating of the buyer.⁴³ Their position, contrary to that of the majority view, is that the lender's objective in raising his interest rates is not a justifiable reason to accelerate.⁴⁴ The third view is similar to the second, but different in that the court does not reach the question of whether a restraint on alienation is involved. The courts following this position employ the rule that a court of equity may relieve a mortgagor from foreclosure if the result is inequitable and unjust.⁴⁵ An unjust result is said to occur when the lender attempts to exercise the acceleration clause without showing a threat to the security.⁴⁶

All three viewpoints agree that a mortgagee may exercise the due-on clause when there is a genuine threat to the security; this is without question a legitimate and justifiable interest which the lender may protect.⁴⁷ All of those

41. *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Ass'n*, 99 Cal. Rptr. 417, 421 (Dist. Ct. App. 1971); *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1244 (Colo. 1973) (en banc). See *Cherry v. Home Sav. & Loan Ass'n*, 81 Cal. Rptr. 135, 138 (Dist. Ct. App. 1969). This case has been disapproved to the extent it is inconsistent with the subsequent California case of *Tucker v. Lassen Sav. & Loan Ass'n*, 116 Cal. Rptr. 633, 640 (1974). In *Tucker*, the court adopted the threat to security approach in a situation involving a land sale contract. *Id.* at 639. The court, however, specifically did not pass on the validity of the due-on sale clause. *Id.* at 636 & n.7. Although California courts will no longer consider the maintenance of a loan portfolio at current rates as a valid justification for the due-on clause, *id.* at 639-40 & n.10, this argument has been quoted with approval by other courts. *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1244 (Colo. 1973) (en banc); *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 585 (N.C. 1976).

42. *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.3d 1240, 1245 (Colo. 1973) (en banc); *Gunther v. White*, 489 S.W.2d 529, 531 (Tenn. 1973); *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works*, 205 N.W.2d 762, 770 (Wis. 1973).

43. *Lemon v. Nicolai*, 190 N.W.2d 549, 550 (Mich. Ct. App. 1971); *Sanders v. Hicks*, 317 So. 2d 61, 64 (Miss. 1975). This same rule is similarly applied to a due-on-encumbrance clause considered in *La Sala v. American Sav. & Loan Ass'n*, 97 Cal. Rptr. 849, 851 (1971) (en banc), and to a clause relating to the conveyance or transfer of any interest in the property in a land sale contract. See *Tucker v. Lassen Sav. & Loan Ass'n*, 116 Cal. Rptr. 633, 639 (1974); *Pellerito v. Weber*, 177 N.W.2d 236, 238 (Mich. Ct. App. 1970).

44. *La Sala v. American Sav. & Loan Ass'n*, 97 Cal. Rptr. 849, 860 (1971) (en banc).

45. *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 193 (Ariz. Ct. App. 1971); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 481 S.W.2d 725, 728-29 (Ark. 1972); *Clark v. Lachenmeier*, 237 So. 2d 583, 584-85 (Fla. Dist. Ct. App. 1970).

46. Cases cited note 45 *supra*.

47. *E.g.*, *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 193 (Ariz. Ct. App. 1971) (equity approach); *Cherry v. Home Sav. & Loan Ass'n*, 81 Cal. Rptr. 135, 138 (Dist.

courts considering the issue also agree that the exercise of the clause operates as a restraint on the alienation of the property.⁴⁸ The source of the difference lies in policy considerations. If the court believes that the right of a lender to maintain as many loans as possible at the current market rates is a justifiable and lawful interest, the restraint is considered a reasonable one and is therefore enforced.⁴⁹ If, however, the court believes that this objective is not justified, then the mortgagee's action is held to be inequitable.⁵⁰

THE TEXAS POSITION

Texas courts have not yet decided the validity of the due-on-sale clause in a deed of trust. There are two Texas cases in which such a clause was incorporated into a deed of trust, but because the parties did not raise the issue, the courts did not rule on the validity of the clause.⁵¹

In *Maier v. Thorman*⁵² the plaintiff held Thorman's note which was secured by a deed of trust. The deed of trust contained a clause which stipulated that if Thorman should sell the land securing the note, Maier had the option either to consent to the assumption of the note by the buyer or to declare the entire debt due. Thorman subsequently sold the property, and the buyers assumed payments on the note. The issue, however, was whether Thorman remained liable as surety when the lender, without the knowledge or consent of Thorman, granted an extension to the purchaser.⁵³ The court held that Maier accepted the buyers as the principal obligors on the note and released Thorman as surety by granting the extension without his knowledge or consent.⁵⁴ The court focused on the extension of the maturity date and did not discuss restraints on alienation or the validity of the clause itself.⁵⁵

In *A.R. Clark Investment Co. v. Green*⁵⁶ a number of individuals held a deed of trust and a chattel mortgage to secure four promissory notes on a motel and the personal property therein. There was a due-on-sale clause in the chattel mortgage giving the mortgagees the option to accelerate if the motel were sold without their prior consent. The mortgagor sold without the lenders' consent, and they sued for acceleration of the debt and for fore-

Ct. App. 1969) (majority position); *Lemon v. Nicolai*, 190 N.W.2d 549, 550 (Mich. Ct. App. 1971) (threat to security approach).

48. *E.g.*, *Tucker v. Lassen Sav. & Loan Ass'n*, 116 Cal. Rptr. 633, 637 (1974) (threat to security approach); *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 584 (N.C. 1976) (majority position).

49. *See* cases cited note 38 *supra*.

50. *See* cases cited notes 43 & 45 *supra*.

51. *A.R. Clark Inv. Co. v. Green*, 375 S.W.2d 425, 431 (Tex. 1964); *Maier v. Thorman*, 234 S.W. 239, 240-41 (Tex. Civ. App.—San Antonio 1921, no writ).

52. 234 S.W. 239 (Tex. Civ. App.—San Antonio 1921, no writ).

53. *Id.* at 240.

54. *Id.* at 240.

55. *Id.* at 240-41.

56. 375 S.W.2d 425 (Tex. 1964).

closure on the deed of trust and the chattel mortgage. Neither the parties nor the court raised the issue of a restraint on alienation,⁵⁷ and the court specifically decided the case on the basis of the chattel mortgage alone.⁵⁸ The court held that the lenders were entitled to accelerate and ordered foreclosure of *both* the chattel mortgage and the deed of trust.⁵⁹ Even though there was no mention of the issue of a possible restraint on alienation of the real property, the Texas Supreme Court allowed the lenders to exercise a due-on-sale clause that indirectly caused foreclosure of a deed of trust. While *Clark* does not establish a rule that must be followed should a lender want to exercise a due-on clause in a home mortgage, it could be argued that the court gave indirect sanction to the validity of this clause.

When the validity of the due-on clause is eventually presented to the Texas appellate courts, it will not be possible to rely on clear precedents in deciding whether the clause should be enforced; however, there is ample persuasive authority from other jurisdictions to support whichever position the courts choose to adopt.⁶⁰

The decisions in other states which advocate the purely equitable approach⁶¹ reached that conclusion primarily on the basis of earlier cases which held that equity can refuse to enforce an acceleration clause in the face of inequitable conduct⁶² or to prevent inequitable and unjust results.⁶³ Texas could follow this approach and avoid a determination of the validity of due-on clauses from the standpoint of a restraint on alienation; there are numerous cases in Texas with similar holdings.⁶⁴ If these precedents were utilized to establish the Texas position, however, the court would still be forced to

57. *Id.* at 427-28. The dissent, however, does mention that the option to accelerate if the mortgagor sold the property without the lender's consent could "effectively block any sale that Clark [the mortgagor] might negotiate." *Id.* at 441.

58. *Id.* at 431.

59. *Id.* at 430.

60. Some courts have relied primarily on the decisions in other jurisdictions. See *People's Sav. Ass'n v. Standard Indus., Inc.*, 257 N.E.2d 406, 407 (Ohio Ct. App. 1970), following *Coast Bank v. Minderhout*, 38 Cal. Rptr. 505 (1964); *Walker Bank & Trust Co. v. Neilson*, 490 P.2d 328, 329 (Utah 1971), following *Cherry v. Home Sav. & Loan Ass'n*, 81 Cal. Rptr. 135 (Dist. Ct. App. 1969).

61. See cases cited in note 45 *supra*.

62. *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 481 S.W.2d 725, 728 (Ark. 1972).

63. *Clark v. Lachenmeier*, 237 So. 2d 583, 584 (Fla. Dist. Ct. App. 1970). See also *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 193 (Ariz. Ct. App. 1971), where the court said that "[c]ourts of equity may refuse to enforce these clauses where they will work a hardship on the debtor and the mortgagee is not prejudiced by the breach."

64. In *Parker v. Mazur*, 13 S.W.2d 174, 175 (Tex. Civ. App.—San Antonio 1928, writ *dism'd*), the court ruled that "a court of equity may relieve against a provision for acceleration where the default of the debtor . . . is procured by the . . . inequitable conduct of the creditor himself." See *Motor & Indus. Fin. Corp. v. Hughes*, 157 Tex. 276, 289, 302 S.W.2d 386, 394 (1957) (exercising acceleration clause and foreclosing is a harsh remedy); *Brown v. Hewitt*, 143 S.W.2d 223, 227 (Tex. Civ. App.—Galveston 1940, writ *ref'd*) (quoting rule in *Parker*).

decide, as a matter of policy, whether "inequitable conduct" included acceleration of the debt for the purpose of obtaining higher interest rates.⁶⁵

Two state courts have looked to their case law on restraints on alienation and have struck down the due-on-sale clause as unreasonable in light of the general rule that restraints on alienation are not favored.⁶⁶ The Texas Supreme Court has expressed this same policy against restraints on alienation,⁶⁷ and the rule is of such general character that it could support a view holding the clauses invalid. It would also be possible for a court confronted with a due-on clause to examine those situations which Texas has categorized as exceptions to the rule against restraints.⁶⁸ Texas courts have held the following valid: spendthrift trusts,⁶⁹ right of preemption⁷⁰ and options to purchase,⁷¹ restraints on sale of stock in business organizations,⁷² gifts to charity,⁷³ and trusts for married women.⁷⁴ There are two types of restraints on alienation held by Texas courts to be unacceptable: restraints on the right to partition⁷⁵ and restraints on life estates.⁷⁶ A significant difference exists between the types of restraints imposed in these various exceptions and the type of restriction imposed by a due-on clause. The objective sought in the former is to prohibit the sale or transfer of property. A mortgagee seeks only

65. Compare *Baltimore Life Ins. Co. v. Harn*, 486 P.2d 190, 193 (Ariz. Ct. App. 1971) (without alleging jeopardy of security, mortgagee not entitled to equitable relief), with *Gunther v. White*, 489 S.W.2d 529, 531 (Tenn. 1973) (although equity may relieve a mortgagor from the effects of an acceleration clause where it is the result of the mortgagee's inequitable conduct, the clause may be exercised to obtain current interest rates).

66. *Pellerito v. Weber*, 177 N.W.2d 236, 238 (Mich. Ct. App. 1970); *Sanders v. Hicks*, 317 So. 2d 61, 63 (Miss. 1975).

67. *Citizens State Bank v. O'Leary*, 140 Tex. 345, 350, 167 S.W.2d 719, 721 (1942).

68. See notes 26 & 27 *supra* and accompanying text.

69. E.g., *Monday v. Vance*, 92 Tex. 428, 433, 49 S.W. 516, 518 (1899); *Wallace & Co. v. Campbell*, 53 Tex. 229, 234 (1880); *Estes v. Estes*, 267 S.W. 709, 710-11 (Tex. Comm'n App. 1924, jdgmt adopted).

70. *Foster v. Bullard*, 496 S.W.2d 724, 735 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); *Sibley v. Hill*, 331 S.W.2d 227, 229 (Tex. Civ. App.—El Paso 1960, no writ).

71. *Ward v. Christopherson*, 518 S.W.2d 273, 276 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); *King v. Brevard*, 378 S.W.2d 681, 685-86 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.). *But see* *Trustees of the Casa View Assembly of God Church v. Williams*, 414 S.W.2d 697, 701-02 (Tex. Civ. App.—Austin 1967, no writ).

72. *Mischer v. Burke*, 456 S.W.2d 550, 554 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).

73. *Moore v. Sellers*, 201 S.W.2d 248, 250-51 (Tex. Civ. App.—San Antonio 1947, writ ref'd) (charitable trust).

74. *Monday v. Vance*, 92 Tex. 428, 433, 49 S.W. 516, 518 (1899). *Contra*, 18 TEXAS L. REV. 228, 229 (1940).

75. *Kitchens v. Kitchens*, 372 S.W.2d 249, 252 (Tex. Civ. App.—Waco 1963, writ dismissed). *But see* *Spires v. Hoover*, 466 S.W.2d 344, 347 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.) (cotenants may agree to postpone partition for a reasonable time).

76. *Frame v. Whitaker*, 120 Tex. 53, 59, 36 S.W.2d 149, 151 (1931); *Seay v. Cockrell*, 102 Tex. 280, 286, 115 S.W. 1160, 1163 (1909); *Sprinkle v. Leslie*, 81 S.W. 1018 (Tex. Civ. App. 1904, writ ref'd). *But see* *Simonton v. White*, 93 Tex. 50, 57, 53 S.W. 339, 341 (1899); *White v. Dedmon*, 57 S.W. 870, 872 (Tex. Civ. App. 1900, no writ).

to protect his security interest and to maintain his loan portfolio at current interest rates while the mortgagor retains the absolute right to convey his property. This distinction precludes the applicability of these cases as authority for sustaining or denying the validity of due-on clauses.⁷⁷

The diverse justifications given by courts for enforcing or striking down the clause demonstrate the crucial role which policy considerations play in resolving the problem. For example, without basing their statements on case law or statutes, some courts have made general observations about fluctuating interest rates and their resulting effects.⁷⁸ One court has relied on statements made by a vice-president of a savings and loan association to support its decision to enforce a due-on clause.⁷⁹ Another court stated that the right to money as consideration for not accelerating is "within those powers at least incidental and necessary to the business of a savings and loan association"⁸⁰ While the particular circumstances of the initial Texas case will undoubtedly affect the decision, the Texas courts could base their decisions on similar grounds.⁸¹ An analysis of all the factors, however, reveals that the best treatment of the problem is that afforded by the majority position.

The majority position that due-on clauses are valid and are reasonable restraints on alienation is justified by sound policy considerations. During times of rising interest rates, the sale of mortgaged property will confer a benefit on either the mortgagee or the mortgagor. The mortgagee benefits if he is permitted to exercise the due-on clause and to therefore obtain a higher interest rate on the note. Conversely, if the due-on clause is held invalid and acceleration is not permitted, the mortgagor benefits because buyers are willing to pay a higher purchase price for a home financed at an interest rate materially lower than the current one.⁸²

The courts must decide who will benefit. In doing so, they should remember that the mortgage transaction involves both a lien on real property and a loan of money. While traditional policies and rules governing real property, such as the disfavor of restraints on alienation, cannot be ignored, courts

77. See *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 583-84 (N.C. 1976) (listing restraints held void, yet holding due-on clause valid as indirect restraint).

78. *Cherry v. Home Sav. & Loan Ass'n*, 81 Cal. Rptr. 135, 138 (Dist. Ct. App. 1969); *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 585 (N.C. 1976).

79. *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1244 (Colo. 1973) (en banc).

80. *Shalit v. Investors Sav. & Loan Ass'n*, 244 A.2d 151, 155 (N.J. Super. Ct. 1968).

81. Although Texas has no statutes covering the due-on-sale clause in deeds of trust, the Texas Consumer Credit Code, TEX. REV. CIV. STAT. ANN. art. 5069 (Supp. 1976), and the Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COMM. CODE ANN. §§ 17.41 to 17.63 (Supp. 1976), generally indicate the State's concern with consumer spending and borrowing and its incidents.

82. *Gunther v. White*, 489 S.W.2d 529, 532 (Tenn. 1973). See also Leibold, *Uniform Conventional Mortgage Documents: FHLMC Style*, 7 REAL PROP. PROB. & TR. J. 435, 440 (1972).

must not lose sight of the fact that money lenders must be able to profit from their business.⁸³ If savings and loans are not permitted to employ the due-on clause in their deeds of trust, they will be forced to utilize other methods of maintaining higher interest rates.⁸⁴ At this point, the alternatives seem decidedly inferior. Variable interest rates have not met with enthusiasm,⁸⁵ and short term loans would prevent many individuals from borrowing at all.⁸⁶

THE FNMA-FHLMC STANDARD FORM

Not all lenders are savings and loan associations, but since these institutions supply the bulk of mortgage money to home owners,⁸⁷ their policies and attitudes are important.

In 1970 Congress enacted legislation⁸⁸ that created the Federal Home Loan Mortgage Corporation (FHLMC) and enabled both it and the Federal National Mortgage Association (FNMA) to purchase conventional mortgages, thereby creating a secondary market for this type of mortgage.⁸⁹ Participating lenders may sell mortgages they hold in order to increase their capital. To facilitate these transactions, the agencies developed uniform instruments and insist that savings and loans use them if they intend to subsequently sell the mortgage to either FNMA or FHLMC.⁹⁰ The formulation of the mortgage contract, deed of trust, and note forms involved participation by representatives of both lenders and borrowers, and they reflect concessions by both groups.⁹¹

83. See Note, 11 CAL. W.L. REV. 578, 592-95 (1975) (policies on restraints on alienation inappropriate to analysis of due-on clauses).

84. See *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240, 1245 (Colo. 1973) (en banc) (variable interest rates and short term loans). See also Comment, *Use of "Due-on" Clauses to Gain Collateral Benefits: A Common-Sense Defense*, 10 TULSA L.J. 590, 602 (1975) (charging new borrowers higher rates).

85. See Burns, *The Federal Home Loan Mortgage Corporation—The First 400 Days and Beyond—A Legal View*, 30 FED. B.J. 303, 307 (1971) (legality of variable interest rates for mortgages doubtful in some states; complication in others with usury laws).

86. Interview with Richard Waite, President of First State Sav. Ass'n, in San Antonio, Texas, Sept. 9, 1976. See also Note, 11 CAL. W.L. REV. 578, 593 (1975).

87. See Note, 11 CAL. W.L. REV. 578, 579-80 & n.12 (1975).

88. Emergency Home Finance Act of 1970, 12 U.S.C. §§ 1451-1459 (1970), as amended, (Supp. V 1975).

89. See Jensen, *Mortgage Standardization: History of Interaction of Economics, Consumerism and Governmental Pressure*, 7 REAL PROP. PROB. & TR. J. 397 (1972). For a more complete history and discussion of FNMA and FHLMC, see Bartke, *Fannie Mae and the Secondary Mortgage Market*, 66 NW. U.L. REV. 1 (1971).

90. Interview with Richard Waite, President of First State Sav. Ass'n, in San Antonio, Texas, Sept. 9, 1976. See also Burns, *The Federal Home Loan Mortgage Corporation—The First 400 Days and Beyond—A Legal View*, 30 FED. B.J. 303, 306 (1971).

91. See Burns, *The Federal Home Loan Mortgage Corporation—The First 400 Days and Beyond—A Legal View*, 30 FED. B.J. 303, 306-07 (1971); Jensen, *Mortgage Standardization: History of Interaction of Economics, Consumerism and Governmental Pressure*, 7 REAL PROP. PROB. & TR. J. 397, 399-400 (1972).

The deed of trust or mortgage contract includes a due-on-sale clause,⁹² suggesting that the federal agencies feel that it is necessary. The clause applies only to sales and expressly excludes junior encumbrances and leasehold interests of three years or less not containing an option to purchase.⁹⁸ Under the terms of this form, the lender agrees to waive the right to accelerate if, prior to the sale, the lender and the buyer have agreed that the buyer's credit is satisfactory and that the interest rate will be such as requested by the mortgagee.⁹⁴ If these conditions are met, the mortgagor is released from all obligations under the note.⁹⁵

FNMA also requires the use of their uniform instrument—a note⁹⁶ that is secured by the deed of trust or mortgage.⁹⁷ The prepayment provision of the note provides that the borrower may prepay the loan, and that if he does so with funds borrowed from another lender, the original lender may receive an additional amount.⁹⁸ After five years, however, the mortgagor may prepay any amount on his loan without an extra charge.⁹⁹

The provisions in these forms eliminate many of the problems and sources of criticism of due-on clauses. The clause in the deed of trust applies to sales and not to junior encumbrances. It also specifically states that the

92. The clause is found in uniform covenant 17 which reads as follows:

If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust . . . or (d) the grant of any Leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

FNMA-FHLMC UNIFORM INSTRUMENT, TEXAS FORM 30 (Jan. 1976).

93. *Id.*

94. *Id.*

95. *Id.*

96. The Note stipulates, in part:

If, within five years from the date of this Note, Borrower make(s) any prepayments in any twelve month period beginning with the date of this Note or anniversary dates thereof ("loan year") with money lent to Borrower by a lender other than the Note holder, Borrower shall pay the Note holder (a) during each of the first three loan years — percent of the amount by which the sum of prepayments made in any such loan year exceeds twenty percent of the original principal amount of this Note and (b) during the fourth and fifth loan years — percent of the amount by which the sum of prepayments made in any such loan year exceeds twenty percent of the original principal amount of this Note.

FNMA-FHLMC UNIFORM INSTRUMENT, TEXAS FORM 31 (June 1975).

97. Interview with Richard Waite, President of First state Sav. Ass'n, in San Antonio, Texas, Sept. 9, 1976.

98. See note 96 *supra* and accompanying text.

99. See note 96 *supra* and accompanying text.

interest the buyer will pay will be "at such rate as Lender shall request."¹⁰⁰ This informs the mortgagor that the lender will not necessarily waive his option to accelerate and may request a higher rate of interest from the buyer. Under this form, the mortgagor does not remain liable and is completely released.¹⁰¹ By the terms of the note, prepayment charges are imposed only during the first five years and only if the prepayment is because the mortgagor refinanced through a different lender.¹⁰² Consequently, if the buyer assumes or finances the purchase elsewhere, the lender will not require prepayment charges, which means the acceleration clause and the provision for prepayment charges will never be simultaneously exercised.¹⁰³ While not ideal, these standard forms represent an equitable compromise. The interests of the lender are substantially protected, and with their increasing and widespread use, those home owners having a deed of trust without an acceleration clause will decrease. This will tend to eliminate any advantage now realized by home owners whose deeds of trust do not contain a due-on-sale clause.

CONCLUSION

The exploitation of the due-on-sale clause as a means of increasing interest rates on home loans is a recent development. In times of escalating interest rates mortgage funds available from savings and loans decrease, as do their profits.¹⁰⁴ The due-on clause as a method of solving this problem has been vigorously criticized for restraining alienation. Ultimately, the resolution of the issue requires a policy decision,¹⁰⁵ and those policy considerations mentioned in the decisions following the majority view seem to be sound, logical, and practical.

The provisions in the clause and the circumstances under which it is to be exercised must be equitable to both lenders and borrowers.¹⁰⁶ The FNMA-FHLMC uniform instrument represents such a compromise. The

100. See note 92 *supra* and accompanying text.

101. See note 92 *supra* and accompanying text.

102. See note 96 *supra* and accompanying text.

103. See *Hellbaum v. Lytton Sav. & Loan Ass'n*, 79 Cal. Rptr. 9, 10 (Dist. Ct. App. 1969). In that case when the mortgagor sought the mortgagee's consent to sell, the mortgagee informed the home owner that he would waive his right to accelerate and charge the prepayment fee only if the buyer could pay a five percent assumption fee. As a result, the buyer declined to sell. *Id.* at 10.

104. See Bartke, *Home Financing at the Crossroads—A Study of the Federal Home Loan Mortgage Corporation*, 48 IND. L.J. 1, 8 (1972); Burns, *The Federal Home Loan Mortgage Corporation—The First 400 Days and Beyond—A Legal View*, 30 FED. B.J. 303 (1971).

105. See text accompanying notes 65 and 78-81 *supra*.

106. It should be noted, however, that each savings and loan, regardless of the inclusion of the due-on-sale clause in the deed of trust, will have a policy that is generally followed. One San Antonio savings and loan, for example, never exercises its option to accelerate. Interview with Jerry Kelfer, President of Travis Sav. & Loan Ass'n, in San Antonio, Texas, Oct. 14, 1976.

language employed is clearer than many such clauses, but it is doubtful that most home buyers will fully comprehend the potential impact that a due-on clause may have should they wish to sell their home before the maturity of the loan. The clause could be modified to more adequately forewarn the borrower that the lender may substantially increase the interest rate upon the sale of the home.¹⁰⁷ The degree to which the use of this clause restrains the alienation of property will substantially decrease as more lenders incorporate such a provision in their deeds of trust and more home buyers come to expect current interest rates.

107. Perhaps adding the following phrase, indicated below in italics, to the FNMA-FHLMC clause, *supra* note 92, would give a better warning:

and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request *and the interest rate may be increased to the market rate at the time of the assumption, if higher than the rate now provided for in this Deed of Trust.*