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DEBT ACCELERATION ON TRANSFER OF MORTGAGED PROPERTY*

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I. ACCELERATION ON TRANSFER PROVISIONS—ANALYSIS AND EXPLANATION

Mortgage provisions which restrict the transfer of mortgaged property without the consent of the mortgagee are becoming increasingly common as lenders seek greater protection and higher returns in times of unstable economic conditions. The technique commonly employed is to accelerate the mortgage debt at the option of the mortgagee when the encumbered real estate is transferred or sold. The exact wording of such provisions may vary according to the preference of the lender, but their substantive effects are similar. This discussion will focus on a provision of the recently revised Federal Home Loan Mortgage Corporation form which is likely to have a significant impact on the home mortgage industry.[1] Paragraph 17 of the form provides:

> *If all of any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior consent,* excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant 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 Mortgage 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

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1. The Federal Home Loan Mortgage Corporation form is known as WF Form M-86 11/73.

> interest payable on the sums secured by this Mortgage 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 Mortgage and the Note.[2]

By virtue of such a mortgage clause, the restrictions apply to an ordinary sale or transfer other than one by devise, descent or by operation of law. Furthermore, on such a sale or transfer, the mortgagee may accelerate the entire balance due on the mortgage debt or waive acceleration if the transferee has an acceptable credit rating and agrees to pay the rate of interest which the mortgagee requests. If there is such an agreement between the mortgagee and the transferee, and if the transferee assumes the mortgage, then the mortgagee must release the borrower from all obligations under the note and mortgage.

An obvious effect of the above provisions, at least in an era of rising interest rates, is to allow the mortgagee to raise the interest rate on the outstanding debt whenever the mortgaged property is sold. He can do this simply by refusing to waive the acceleration provisions, thereby allowing the entire sum to become due and payable. In this event, one of several things could happen: (1) The buyer could consummate the sale by using his own funds to satisfy the mortgage debt; (2) the buyer could consummate the sale by financing a new mortgage at the higher prevailing rate, incurring the additional financing costs, and satisfying the existing mortgage debt with the proceeds of the new loan; (3) the sale could be aborted; or (4) the sale could be consummated with the transferee and transferor unable to pay the accelerated mortgage debt so that foreclosure would result. It is important to note that the acceleration clause will be waived only if the mortgagee agrees that the credit of the buyer or transferee is satisfactory *and* the transferee agrees to pay the interest rate demanded by the mortgagee. The mortgagee is free to be entirely arbitrary in refusing to consent to a proposed sale.

Presumably, in an era of declining interest rates, the mortgagee would be more willing to consent to the transfer and approve the new purchaser-owner. During such periods the advantage is still on the side of the lender, since the mortgagor or buyer has no option to accelerate. If refinancing is his choice, he must comply with any prepayment provisions in the mortgage, pay the necessary premiums to the current mortgagee for that privilege, and also incur the considerable financing expenditures involved in refinancing.

Until recently, similar mortgage clauses were less stringent from

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2. WF Form M-86 11/73, para. 17 (emphasis added) [hereinafter referred to as paragraph 17].

the mortgagor's viewpoint. A typical clause[3] allowed the transfer to be made without the consent of the mortgagee, but if the buyer or transferee refused to assume the mortgage, the mortgagee could accelerate. As long as the transferee assumed the obligations and complied with all the mortgage terms, the lending institution was not at liberty to call the loan. The mortgagee was not allowed to increase the interest rate under this provision simply because there was a transfer of the property.

Paragraph 17 of the Federal Home Loan Mortgage Corporation form is not typical of acceleration clauses heretofore found in mortgages nor is it likely to be the only such clause in a mortgage since mortgages customarily permit acceleration of the debt upon breach of any of the mortgage covenants by the mortgagor.[4] The validity of such acceleration clauses has been firmly established. "It is competent for the parties to agree that upon . . . the breach of . . . any condition by the mortgagors, the mortgagee shall have the option of declaring the principal debt to be due and proceed to foreclose for the entire sum due."[5] Thus, the mortgagee has a contract right immediately to receive the full amount outstanding if the borrower should default.

However, it is also recognized that under certain circumstances a "court of equity may refuse to foreclose a mortgage when an acceleration of the due date of the debt would be an inequitable or unjust result and the circumstances would render the acceleration unconscionable."[6] Yet, most acceleration clauses will be upheld as the means by which to protect the mortgagee's interests. The Supreme Court of Florida has stated:

> Such an agreement is not prohibited by statute, nor is it against public policy; it is not in the nature of a forfeiture nor

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3. The following provision was paragraph 17 of a mortgage form used by a federal savings and loan association, the identity of which is withheld:

> If a *conveyance should be made by the Mortgagor* of the premises herein described, or any part hereof, *and the grantee named in such conveyance fails or refuses to assume the payment of the obligation* evidenced by said promissory notes and secured by this mortgage, and in accordance with their respective terms, and abide by the rules and regulations of the Association, including payment of a reasonable transfer fee, *then, and in that event, at the option and upon the demand of the Association all sums* of money secured hereby shall immediately become forthwith due and payable. (Emphasis added.)

4. WF Form M-86 11/73, para. 18, provides:

> [U]pon Borrower's breach of any covenant or agreement of Borrower in this Mortgage, including the covenants to pay when due any sums secured by this Mortgage, Lender prior to acceleration shall mail notice to Borrower specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than thirty days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage and sale of the Property. If the breach is not cured on or before the date specified in the notice, Lender at Lender's option may declare all of the sums secured by this Mortgage to be immediately due and payable without further demand and may foreclose this Mortgage by judicial proceeding.

5. Treb Trading Co. v. Green, 102 Fla. 238, 242, 135 So. 510, 511 (1931), *quoting* Warren v. Creevey, 87 Fla. 46, 51, 99 So. 247, 248-49 (1924).

6. Campbell v. Werner, 232 So. 2d 252, 256 (Fla. 3d Dist. 1970), *quoting* Althouse v. Kenney, 182 So. 2d 270, 272 (Fla. 2d Dist. 1966).

> a hard contract which it would be unconscionable to enforce, because an investor may very properly insist that his security shall be kept intact or that the loan shall mature. In fact, such a provision is very analogous to an agreement that a failure to pay the interest promptly shall render the whole principal due.[7]

II. RESTRAINTS ON ALIENATION

A. *Generally*

Although a mortgage acceleration provision per se may be valid, the effect of such a provision on the alienability of the encumbered property must also be considered. For centuries the free alienability of land has been a favored objective of the common law. Generally, a mortgagor, as beneficial owner, could do as he wished with his property. He could use the premises in any manner as long as he did nothing to destroy or impair the mortgagee's security interest. This freedom of action included the power to sell and convey his interests without interference.[8] A transfer of mortgaged land normally did not prejudice the rights of the lender because the transferor or original mortgagor remained liable on the debt, and the grantee took subject to the encumbrance.[9]

Paragraph 17 obviously restricts this freedom of alienation enjoyed by the mortgagor. In order to determine the probable validity of this restriction, it is necessary first to review the law regarding restraints on alienation; second, to examine judicial decisions construing similar clauses; and third, to assess the overall effect on alienation of the provisions in issue.

A restraint on alienation refers not only to direct restrictions on the legal power to alienate, but also to provisions that restrict alienation as a practical matter. "Any provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation."[10] Restraints may be classified as direct or indirect:

> A direct restraint on alienation is a provision in a deed, or will . . . which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation . . . . An indirect restraint . . . arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental

7. Treb Trading Co. v. Green, 102 Fla. 238, 242-43, 135 So. 510, 512 (1931).

8. G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 247-48 (2d ed. 1970).

9. *See* 59 C.J.S. *Rights of Mortgagor in General* § 308 and *Sale or Lease of Premises* § 309 (1949); G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 247 (2d ed. 1970).

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

result that the instrument, if valid, would restrain practical alienability.[11]

A mortgage contract itself may be classified as an indirect restraint because it gives rise to a divided title in the property and thereby invariably restrains a free and practical transfer.[12] A provision such as paragraph 17 is at least an indirect restraint on alienation because it does impede the transfer of mortgaged property. Is it also a direct restraint? The essential terms are that if there is a non-exempt transfer of the mortgaged property, the mortgage debt shall be accelerated unless the lender has waived such provision by approving the transferee and agreeing with him on the interest rate that the transferee will pay. Thus, there is no blanket prohibition against the transfer of the mortgaged property, only an acceleration of the debt if a transfer is made without the prior consent of the mortgagee. But, insofar as it penalizes such a transfer by imposing an acceleration of the mortgage debt, it does indeed fall within the definition of a direct restraint.[13] Further, considering the importance of mortgage financing in real estate transactions, the effect of paragraph 17 in many instances might well be the same as if it stated, "[n]o sale or non-exempt transfer shall take place without the prior written consent of the mortgagee or lender." It is submitted that a blanket provision such as this would be clearly void under principles to be developed below.

The prohibition of a sale without the consent of a third party is a type of disabling restraint,[14] since it attempts to remove the feature of alienability unless the third party consents thereto. Disabling restraints, except in the case of equitable interests under spendthrift trusts, are commonly held void.[15] Forfeiture[16] and promissory restraints[17] on life estates and estates for years are generally upheld;[18] whereas similar restraints on fees simple are usually invalidated.[19] Unlimited direct restraints on fees simple are generally held void;[20] however, some courts do allow direct or indirect restraints for a

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11. *Id.* § 1112, at 4, 5.

12. *Id.* § 1201, at 88.

13. See note 11 *supra* and accompanying text.

14. A disabling restraint exists when property is conveyed or devised with a direction that it shall not be alienated. . . . and if valid, it would operate to remove the power of alienation as a characteristic of the estate granted.

L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1131 (2d ed. 1956).

15. L. SIMES, FUTURE INTERESTS § 113 (2d ed. 1966).

16. A forfeiture restraint exists when, by the terms of an instrument of transfer, the estate transferred will be subject to forfeiture on alienation. L. SIMES, FUTURE INTERESTS § 112 (2d ed. 1966).

17. A promissory restraint refers to a covenant in an instrument of conveyance, or to a contract, in which the promisor agrees not to alienate the property. *Id.*

18. *Id.* at §§ 115, 116.

19. *Id.* at § 114.

20. Roemhild v. Jones, 239 F.2d 492, 496 (8th Cir. 1957) (upholding the validity of a particular repurchase option).

limited time if such restrictions are reasonable and do not violate the rule against perpetuities.[21] One court has stated:

> In many jurisdictions restraints on alienation are not invalid as against public policy if they are reasonable although they will not be upheld unless they serve a legal and useful purpose, or unless positive law or public policy demands it.
>
> Where restraints are not ipso facto void, whether a substantial restraint on alienation is valid depends on the particular circumstances; and the public policy against restraints on alienation may be relaxed where the circumstances convince the court that it is a reasonable means of accomplishing a purpose recognized as proper . . . .[22]

Some states permit *reasonable* restraints upon alienation if they are legitimately designed to attain some accepted social or economic end. Thus, a court must analyze such restraints to determine their validity. The United States Court of Appeals for the Seventh Circuit has indicated what should be considered when making such an analysis:

> [T]he crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained. No restraint should be sustained simply because it is limited in time, or the class of persons excluded is not total, or all modes of alienation are not prohibited. These qualifications lessen the degree to which restraints violate general public policy against restraining alienation of property and should be considered to that extent; but they are not, in themselves, sufficient to overcome it. In short, the law of property, like other areas of the law, is not a mathematical science but takes shape at the direction of social and economic forces in an ever changing society, and decisions should be made to turn on these considerations.[23]

The court indicates that in dealing with restraints on alienation, it is more concerned with practical rather than theoretical considerations. It is necessary to weigh the beneficial characteristics of the restraint against the extent to which alienability would be hindered. Thus, in relation to paragraph 17, one must compare the advantages to the

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21. *Id.*

22. *Id.* at 496-97, *quoting* 73 C.J.S. *Property* § 13b (1951).

23. Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135, 136 (7th Cir. 1967), *quoting* Gale v. York Center Community Cooperative, Inc., 21 Ill. 2d 86, 92-93, 171 N.E.2d 30, 33 (1960). The court in *Mowatt* upheld the restriction on assignment of a cooperative apartment lease without consent of the lessor-corporation after reading into the provision the requirement of "reasonable exercise."

lender with the detriment to the borrower should he desire to sell his property subject to a mortgage.

B. *Judicial Interpretation of Provisions for Acceleration on Sale*

Although certain restraints on alienation have been upheld for many years,[24] clauses such as paragraph 17 are relatively new and cases construing similar provisions are limited. The few courts which have been faced with problems of mortgage acceleration on transfer without consent are in conflict as to the enforceability of the clauses. Some courts have been able to render a decision on similar provisions without actually determining the validity of the limitation.

In *Home Federal Savings and Loan Association v. English,*[25] a mortgage clause provided that if a conveyance were made without the written consent of the mortgagee and without assumption by the grantee, the mortgagee would have the option to call the loan. The court avoided the question as to whether the clause was valid or invalid, and refused foreclosure and acceleration because it was necessary for *both* conditions to occur. There was no written consent to the sale but there was an assumption by the purchaser; and thus the court was able to avoid a 'legality' ruling since the clause said "and" instead of "or."

In an Arkansas case,[26] a mortgagee brought an action against the mortgagor, his father and subsequent purchasers for judgment in the amount of the indebtedness due because the mortgagor had sold the premises without written consent of the mortgagee. The Supreme Court of Arkansas accepted the validity of a clause similar to paragraph 17 but held that it could not be enforced without the lender fulfilling an implied obligation to justify its refusal to consent to the sale to a particular purchaser.[27] The lender was thus not able to accelerate and foreclose on the property without justification. In the opinion, the court analyzed the advantages and disadvantages of clauses which accelerate the debt should a mortgagor sell all or part of the premises without written consent of the mortgagee:

> [W]e can certainly see why a mortgagee would object to some transfers; a mortgagor, if permitted, could sell his equity in property and transfer the indebtedness to a person who had been convicted of operating a bawdy house . . . a gambling house, or illegally selling whiskey or drugs . . . [or] an individual who persistently had failed to pay his obligations,

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24. *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1115, 1117, 1131, 1135, 1168 (2d ed. 1956).

25. 249 So. 2d 707 (Fla. 4th Dist. 1971).

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

27. *Id.*

> who was without a job, or who had a record of permitting property to deteriorate.
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> On the other hand . . . a mortgagor could be transferred from his job . . . he could be in the position of being forced to sell to someone at great sacrifice . . . . The validity of such a requirement would leave a mortgagor much at the mercy of the mortgagee . . . [and we agree] that there must be *legitimate grounds for refusal to accept or transfer to a particular individual or concern.*[28]

The Arkansas court specifically held that the mortgagee did not have valid business reasons for withholding its consent and must therefore accept the transfer. So, despite the clause itself being valid, the court refused to enforce it on the facts of this case. The dissenting judge felt it was not

> for us or any judicial tribunal to pass on the business judgment of those whose experience gives them insight into such matters, so long as there are factors that require a choice between alternatives which are dependent upon the exercise of that judgment and there are *any* reasons that would support the choice made.[29]

Other courts have used the business objective test to sustain similar clauses. In *People's Savings Association v. Standard Industries, Inc.*,[30] the court felt that the mortgagee had a right to protect its security interest by maintaining control over the identity and financial capabilities of the purchaser. This was therefore a legitimate business objective and mortgage provisions designed to attain it would not be illegal, inequitable or contrary to public policy.

In *Mutual Federal Savings and Loan Association v. Wisconsin Wire Works*,[31] the Supreme Court of Wisconsin held that a provision in a mortgage whereby the balance would become due if the mortgagor conveyed the premises without the consent of the mortgagee was not against public policy. However, the court qualified its holding by stating that enforcement depended upon the facts of each particular case and whether the invocation of the clause would be inequitable under the circumstances. This case is basically in accord with the Arkansas decision, in that a case by case analysis of the circumstances should be used to determine the equities of enforcing a clause such as paragraph 17.

The Florida District Court of Appeal, Second District, held that the mortgagees were not entitled to foreclose because of noncompliance

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28. *Id.* at 729 (emphasis added).
29. *Id.* at 737 (Fogleman, J., dissenting).
30. 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970).
31. 58 Wis. 2d 99, 205 N.W.2d 762 (1973).

with a mortgage provision requiring consent before conveying, so long as no harm resulted to the mortgagees from such conveyance.[32] The lenders claimed there was a breach of the mortgage contract when the transfer of title to the mortgaged property was made without their approval. Because of this breach, the acceleration clause was activated and the mortgagees claimed they were entitled to full payment. However, they did not allege any other breach nor did they allege "that the security had been impaired by the default, or that they had disapproved the transfer of ownership of the mortgaged property, or that they had not had opportunity to pass on the credit of the successor in ownership."[33] The court stated that a court of equity may refuse to foreclose any mortgage if an acceleration would be unconscionable and the result would be unjust and inequitable. A court has the power to relieve a mortgagor from an acceleration clause where a default is the result of an unreasonable or unconscionable act of the mortgagee, or where the default causes no harm to the security and it would therefore be unjust to foreclose.[34] In order for the mortgagees to have prevailed, this Florida court would have required evidence of harm to the security. Courts generally do not speculate as to what might happen to the secured interest in the future. Thus, the clause in this case was held inequitable and unjust, and foreclosure was denied. In a subsequent suit on a promissory note, the same district court of appeal held that the note, secured by a mortgage containing an acceleration clause conditioned on the sale of the property, can be accelerated upon the sale of the property. The court did not apply equitable principles to nullify the clause and left open the question of whether upon the sale of the property, the mortgage can be accelerated and foreclosed without a showing of prejudice to the mortgagee by reason of the conveyance.[35]

In *Malouff v. Midland Federal Savings and Loan Association,*[36] the Supreme Court of Colorado reversed a lower court decision and held that a "due on sale" clause in a deed of trust which permitted the lender, after sale of property securing a loan, to accelerate whether or not any default existed, was a reasonable restraint on alienation. The court also found that it was not unreasonable for a lender to impose a higher interest rate on one who buys property subject to a mortgage as a condition for not invoking the acceleration clause. The decision discussed the fact that it is a

> justifiable interest of the lender to protect itself against a rise in the interest rate and to permit an acceleration of the

32. Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d Dist. 1970).
33. *Id.* at 584.
34. *Id.* at 584-85.
35. Stockman v. Burke, 305 So. 2d 89 (Fla. 2d Dist. 1974).
36. __ Colo. __, 509 P.2d 1240 (1973).

> indebtedness on sale where the purchaser will not agree to pay an increased interest rate on assumption of the loan . . . .
>
> When interest rates are high, a lender runs the risk they will drop and that the borrower will refinance his debt elsewhere at a lower rate and pay off the loan, leaving the lender with money to loan but at a less favorable interest rate. On the other hand, when money is loaned at low interest, the lender risks losing the benefit of a later increase in rates. As one protection against the foregoing contingency, a due-on-sale clause . . . is merely one example of ways taken to minimize risks by sensible lenders.[37]

Thus, the court did not feel that the efforts of the bank in trying to protect itself from the effects of inflationary economic conditions were illegal or improper. Since there was no effort to extract an excessive interest rate from the new purchaser, the clause was not inequitable or unconscionable and foreclosure could validly be made.

III. SUMMATION AND CRITIQUE

A brief summation of the cases involving mortgages with provisions similar to the one under discussion reveals that they have employed different techniques and reached different results: (1) A doctrine of strict construction so that if *all* the conditions for acceleration are not met, acceleration will not be permitted;[38] (2) a requirement that the mortgagee justify his refusal to consent to the purchase; in the absence of which acceleration will not be permitted;[39] (3) a willingness to permit acceleration on the general principle that the mortgagee has a right to protect the security, unless acceleration would be inequitable under the circumstances;[40] (4) a refusal to permit acceleration if no harm to the mortgagee would result from the transfer;[41] and (5) an approval of the entire scheme on the basis that it is a reasonable business practice and thus not an unreasonable restraint on alienation.[42]

Considering paragraph 17 as restraint on alienation, it seems clear that it should not be invalidated as a direct disabling restraint because the provision does not preclude transfer without the mortgagee's consent. It permits transfer, but provides that on such an occurrence the mortgagee may accelerate the debt. As previously mentioned, how-

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37. ___ Colo. at ___, 509 P.2d at 1244, *citing* Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (2d Dist. 1969).

38. See note 25 *supra* and accompanying text.

39. See note 26 *supra* and accompanying text.

40. See note 31 *supra* and accompanying text.

41. See note 32 *supra* and accompanying text.

42. See notes 30 and 36 *supra* and accompanying text.

ever, it has an indirect but significant effect on alienation[43] and thus should be evaluated in that light.

The reasonableness of the restraint may well become a critical factor in a determination of its validity. This then would seem to require a balancing of the benefits to be derived from such provisions against the detriments to the borrower and adverse effects on alienability. As to the scope of the restraint, it is to be noted that it does not apply to transfers by devise, descent or by operation of law, the creation of subordinate encumbrances or the creation of short term leaseholds without an option to purchase. Of these exceptions, the most significant relates to transfers by devise, descent and operation of law. If the provisions were to apply to such transfers, the burden and risk on the mortgagor would be exceedingly great. A further concession is given to the mortgagor in that he will be released if the mortgagee has waived the option to accelerate and the purchaser has assumed in writing the mortgage obligations.

From the mortgagee's viewpoint, the lender gets greater protection of his security by the ability to approve or veto a prospective purchaser of the property. In addition, he obtains a tremendous financial advantage under the clause in question. By otherwise refusing to consent to the transfer, the mortgagee can collect greater revenues either by an adjustment of the interest rate or by means of an agreement whereby for a certain sum, the original rate of interest would remain the same. Thus, if the prevailing interest rate rises, the lending institution can bring the former rate into harmony with present values. If the prevailing interest rate falls, the mortgagee will naturally choose to leave the rate at the status quo.

Additionally, lending institutions assert that the new provisions serve a public need in supplying loan funds. Their contention is that uniform mortgage contracts with flexible provisions, such as paragraph 17 and its added safety factor with respect to the security, facilitate the transfer of mortgages between lenders in various parts of the country. Thus, cash can more readily flow from areas with a surplus of funds to areas with an abundance of borrowers and a shortage of cash.

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43. In this regard statutory and judicial expressions of public policy may be helpful. For example, a section of the Florida statutes provides that

> reverter or forfeiture provisions of unlimited duration in the conveyance of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of the state.

FLA. STAT. § 689.18(1) (1973).

The statute then goes on to limit the duration of certain possibilities of reverter and rights of re-entry to a period of 21 years. It is an accepted principle that certain types of future interests are invalid as constituting unreasonable restraints on alienation. The Rule Against Perpetuities is a classic example. Thus, by analogy, it could be argued that mortgage provisions such as paragraph 17 have such an adverse effect on alienation as to constitute an unreasonable restraint. This would be particularly so if no requirement of reasonableness or justification were imposed on the mortgagee's discretion either to approve of the transfer or to accelerate the indebtedness.

From the borrower's viewpoint, if the owner wishes to sell his mortgaged property, he is in most instances at the mercy of the lender. If the lender is unwilling to approve the transferee or to allow an assumption without a large fee or an increase in the rate of interest, there may be no sale. Many prospective buyers may decline when faced with the prospect of having to pay an additional fee and/or increased interest rates. Is not this arbitrary power of the mortgagee over the sale of the mortgagor's property an unreasonable restraint on alienation? Further, is there a genuine need for such power to be vested in the mortgagee when in any event (assuming no novation), he would have recourse against the original borrower on the note and against the land in the hands of the transferee?

The device of paragraph 17 may be essentially an indirect way of increasing the return to the lender in an era of rising interest rates. If so, would not a note with a variable interest rate be a more honest and direct method of achieving the same result? Further, such a direct approach could be even more beneficial to the lender since the rate could be adjusted periodically whether or not there is a conveyance of the land. However, the variable interest rate mortgage has not proved popular in this country. Perhaps the reason is that each side of the transaction is unwilling to bear the risk that the interest rate will move in the wrong direction.

IV. CONCLUSION

Provisions such as paragraph 17 are apt to become more and more prevalent; with such increased use, it is reasonable to expect an increased number of controversies and litigation. The provision invites litigation, particularly if the borrower-mortgagor is not fully apprised of the meaning and subtlety of the clause at the time he executes the mortgage.[44] One solution would be for the legislature to take a stand on the validity of such provisions, or to prescribe standards by which permissible mortgage terms may be distinguished from those which are impermissible. In this consumer-oriented era, such a development is not entirely unexpected.

In the absence of legislative action or an authoritative supreme court decision, however, it would appear that uncertainty best describes the status of such clauses. As to the acceleration feature itself, the courts may avoid the point entirely by ascertaining that under the particular facts of a case, acceleration would be inequitable, and thus

44. The imposition of a duty on the lender to disclose fully the meaning of this and the many other fine print mortgage clauses would not be an unreasonable obligation in our consumer-oriented society. At the time of the loan application, it could be required by statute or appropriate regulation that a copy of the proposed mortgage in addition to an explanation of its essential terms be supplied the borrower. In this way, he would have an opportunity to consider their impact and to seek intelligent legal advice instead of being confronted with the lengthy document for the first time at the closing.

refuse to enforce it. The provision appears valid insofar as the rule prohibiting direct restraints on alienation is concerned, since acceleration of the mortgage debt technically does not prohibit alienation. As to whether it should be held invalid as an unreasonable indirect restraint on alienation, a factual survey as to whether such provisions do in fact adversely affect sales of land would be most interesting albeit unique.[45] Considering the importance of financing in real estate transactions, it certainly seems logical, especially in times of rising interest rates, that the possibility of losing a favorable existing mortgage would make sales more difficult. Thus, at least as to individual homeowners,[46] it is believed that such provisions should be held invalid as unreasonable restraints not essential for the protection of mortgagees.[47]

In the absence of factual marketing data as to whether or not these provisions do in fact substantially affect sales and transfers, a court can only base its judgment on the experiences of the judges. In the meantime, it seems reasonable to assume that such clauses will become increasingly common and "accelerate the tribulations of the borrower."

45. The authors are unaware of any empirical study or accumulation of market data used as a justification, for example, of applying the Rule Against Perpetuities in invalidating remote contingent future interests. It is simply assumed that such interests do in fact impede marketability.

46. Developers of large projects and commercial entrepreneurs will generally have sufficient sophistication, expert legal and financial advice and adequate borrowing power to appraise intelligently and negotiate acceptable terms of mortgage financing.

47. The mortgagees still have a security interest in the land and a claim for the debt against the original mortgagor.