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V. Commercial Law

gently inquired as to the status of the case before asserting failure of notice as a basis for Rule 60(b)(6) relief.[88] The Fourth Circuit's holding in *Hensley* also serves as an implicit message to district courts to reconsider a case pursuant to Rule 60(b)(6), but not to vacate and reenter the final judgment for appeal purposes except under "unique" circumstances.[89]

The strained analysis of the *Hensley* decision does not reveal, however, whether the Rule 60(b)(6) movant must make a concomitant showing of a putative meritorious claim or, conversely, whether the nonmoving party must show that vacation and reentry of the "final" judgment will prejudice it.[90] Further, it is not clear what unique circumstances will justify relief under Rule 60(b)(6), nor is it clear whether failure to receive notice could ever provide the basis for Rule 60(b) relief.[91] Finally, although in the default or dismissal context courts previously have resolved doubts in favor of granting relief from final judgment,[92] the logical extension of the *Hensley* ruling is to impose the duty of diligent inquiry even in the default or dismissal case.

In short, the conceptual confusion the *Hensley* approach creates is unsatisfactory because such confusion will only serve to prompt further litigation within the Fourth Circuit, thereby frustrating the policy of finality that the analysis sought to further. Nevertheless, the Fourth Circuit in *Hensley* partially clarified both the limits within which the district court is to exercise its discretion and the nature of the showing that the prospective appellant must make when bringing a Rule 60(b)(6) motion to extend the time for appeal.

WILLIAM D. JOHNSTON

V. COMMERCIAL LAW

A. The Activation and Enforceability of "Due-On-Sale" Clauses

The enforceability of "due-on-sale" clauses appearing in most savings and loan association mortgages has been the topic of much recent litigation.[1] A "due-on-sale" clause allows a lender to accelerate the

[87] *See* note 4 *supra.*

[88] *See* text accompanying notes 84-86 *supra.*

[89] *See Equitable Power, supra* note 31, at 429.

[90] *See* text accompanying notes 32-34 *supra.*

[91] *See* text accompanying note 88 *supra.*

[92] *See* note 80 *supra.*

[1] *See* Smart v. First Fed. Sav. & Loan Ass'n, 500 F. Supp. 1147 (E.D. Mich. 1980) (22 consolidated cases involving enforceability of "due-on-sale" clauses).

balance of a mortgage when a landowner transfers all or part of his property to a third party.[2] Lenders originally designed "due-on-sale" clauses for protection against buyers of mortgaged property who are not as financially sound as the original mortgagor.[3] Now lenders increasingly use "due-on-sale" clauses as a method of keeping loan portfolios earning current rates of interest.[4] Thus, when a purchaser of property attempts to assume a mortgage charging lower than market interest, the savings and loan association holding the mortgage may accelerate the balance due if the purchaser refuses to refinance at current rates. Federal courts generally uphold both the validity and enforceability of "due-on-sale" clauses by employing the doctrine of federal preemption.[5] In *Williams v.*

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[2] *See* First Fed. Sav. & Loan Ass'n v. Peterson, 516 F. Supp. 732, 734 (N.D. Fla. 1981). When a lender "accelerates" a mortgage, the lender declares the balance of the loan due and payable. *Id.* A "due-on-sale" clause is a contractual right that grants the lender the power to accelerate the balance of the mortgage. *Id. See also* 12 C.F.R. § 545.8-3(f) (1981) (definition of "due-on-sale" clause and authority of savings and loans to use them).

[3] *See generally* Note, *Enforcement of Due-On Transfer Clauses*, 13 REAL PROP. PROB. & TR. J. 891, 894-95 (1978) [hereinafter cited as *Enforcement*]. Savings and loan institutions currently use "due-on-sale" clauses to keep their investment portfolios earning the current market rate of interest. *Id.* at 896. When the lender activates the "due-on-sale" clause, the lender may insist that the homeowner-seller pay the balance of the outstanding mortgage. *Id.* The lender then may reloan the funds at current rates. *Id.* Often, the lender may agree not to accelerate the mortgage if the buyer will refinance the balance of the loan at prevailing rates. *Id.*

[4] *Id.*

[5] *See* First Fed. Sav. & Loan Ass'n v. Peterson, 516 F. Supp. 732, 741 (N.D. Fla. 1981) (federal law preempts all state law dealing with use of "due-on-sale" clauses by federal savings and loans to obtain higher interest rates); Conference of Fed. Sav. & Loan Ass'ns v. Stein, 495 F. Supp. 12, 16 (E.D. Cal.), *aff'd*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1981) ("due-on-sale" clauses both valid and enforceable because of federal preemption); Bailey v. First Fed. Sav. & Loan Ass'n, 467 F. Supp. 1139, 1141 (C.D. Ill. 1979) (federal law preempts any state regulation of lending practices of federal savings and loans). The federal preemption doctrine stems from the supremacy clause of the United States Constitution. U.S. CONST. art. VI, cl. 2. The preemption doctrine provides that if Congress intends federal law on a subject to operate exclusively of state law, then courts must disregard the state law. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06 (1819). Congress may express an intent to make federal law exclusive either explicitly in the statutory language or legislative history of the statute, or implicitly by creating a legislative or regulatory framework so pervasive that the states have no room to act in the particular area. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-39 (1947). Both explicit and implicit preemptive intent exist with respect to the use of "due-on-sale" clauses by federal savings and loans. Federal preemptive intent is expressed with respect to "due-on-sale" clauses in the newly amended Federal Home Loan Bank Board (F.H.L.B.B.) regulations, which state that the F.H.L.B.B. soley governs the use of "due-on-sale" clauses by federal savings and loan associations. 12 C.F.R. § 556.9(f)(2) (1981); *see* 50 U.S.L.W. 2105 (August 18, 1981). Congress expressed its implicit preemptive intent to regulate federal savings and loan associations in the creation of the F.H.L.B.B. *See* Dunn & Nowinski, *Enforcement of Due-On Transfer Clauses: An Update*, 16 REAL. PROP. PROB. & TR. J. 291, 292-93 (1981) [hereinafter cited as *Dunn & Nowinski*]. Prior to the creation of the F.H.L.B.B., the public blamed the varied practices of lending institutions in the several states for the large numbers of home mortgage defaults during the Depression era. *Id.* at 292. Congress reacted by creating a uniform

First Federal Savings and Loan Association of Arlington,[6] the Fourth Circuit addressed the issue of whether "due-on-sale" clauses in savings and loan association mortgages are enforceable.[7]

In *Williams*, a homeowner desired to sell property upon which First Federal Savings and Loan of Arlington (Arlington) held a thirty year deed of trust[8] at a ten percent interest rate and containing a "due-on-sale" clause.[9] The homeowner entered into a standard real estate sales contract for sale of the property to Jeffrey and Susan Williams.[10] The contract transferred to the Williamses the "beneficial interests" in a land trust that the owner-seller was to create.[11] By means of a separate document, the owner-seller subsequently created the land trust, naming herself as both trustee and beneficiary.[12] The homeowner then granted, bargained, and assigned to herself as trustee the property subject to Arlington's deed of trust.[13] In addition, the owner-seller assigned her beneficial interests[14] in the land trust, including all interest in the property subject to the Arlington deed of trust, to the Williamses in perpetuity.[15] Treating the assignment as a transfer by the homeowner without the lender's consent, Arlington declared the balance of the seller's mortgage to be due and payable pursuant to the "due-on-sale" clause in the homeowner's deed of trust agreement.[16] The Williamses

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system of federal saving and loan associations. *Id.* Congress also created the F.H.L.B.B. and gave it authority to develop a pervasive system for the operation of the federal savings and loan system. *Id.* at 292-93.

[6] 651 F.2d 910 (4th Cir. 1981).

[7] *Id.* at 912.

[8] *Id.* at 913-14. Deeds of trust are substantially equivalent to common-law mortgages. Yasuna v. Miller, 399 A.2d 68, 71-72 (D.C. 1979). Virginia authorizes use of the deed of trust instead of the mortgage prevalent in other states. Le Brun v. Prosise, 197 Md. 466, 473-74, 79 A.2d 543, 547 (1951).

[9] *See* 651 F.2d at 914 n.5. The actual note securing the homeowner's deed of trust was not in the trial record. *Id.* The court calculated the interest rate on the note between 10 and 10.25%. *Id.* For convenience, the *Williams* court referred to the interest rate as 10%. *Id.*

[10] *Id.* at 916.

[11] *Id.*

[12] *Id.* at 917.

[13] *Id.*

[14] *Id.* The "beneficial interests" that the Williamses received encompassed all rights of enjoyment, occupancy, and use. *Id.*

[15] *Id.* In establishing the land trust comprised solely of the homeowner's property, the homeowner attempted to alter the legal form of her rights of use and enjoyment in the home from real to personal property. *Id.* The homeowner assigned her beneficial interests to the Williamses with the intent to effectuate a conveyance of ownership rights without tranferring legal title and thereby activating the "due-on-sale" clause. *Id.* at 917-18. Legal title to the property remained in the land trust at all times. *See* note 26 *infra*.

[16] 651 F.2d at 914 n.7. The "due-on-sale" clause in the homeowner's deed of trust was part of a uniform Federal Home Loan Mortgage Corporation instrument. *Id.* The "due-on-sale" clause states that "If all or any of the property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, . . . Lender may, at Lender's option, declare all sums secured by this Deed of Trust to be immediately due and payable." *Id.*

brought suit in federal district court to determine their right to assume the seller's mortgage.[17] The district court held that the assignment activated the "due-on-sale" clause because the language of the Williams' "due-on-sale" clause clearly stated that any conveyance or transfer of title gives the lender the right to accelerate the balance of the mortgage.[18]

On appeal to the Fourth Circuit, the Williamses argued that the "due-on-sale" clause could not activate because the assignment of beneficial interests to them from the owner-seller did not constitute a transfer of title under the "due-on-sale" clause.[19] Moreover, the Williamses argued that even if the "due-on-sale" clause did activate, the clause was unenforceable as a prohibited restraint on alienation[20] or, alternatively, as a violation of the Virginia antitrust law.[21] The Fourth Circuit rejected the Williams' arguments, holding that the seller's assignment of the "beneficial interests" activated the "due-on-sale" clause.[22] In addition, the *Williams* court concluded that the "due-on-sale" clause was not an unreasonable restraint on alienation[23] or a violation of Virginia antitrust law.[24] Consequently, the Fourth Circuit affirmed the district court's holding that the "due-on-sale" clause in the homeowner's deed of trust agreement was enforceable upon the assignment of the beneficial interests to the Williamses.[25]

The Williamses argued that only a conveyance or transfer of title to the mortgaged property could activate the "due-on-sale" clause.[26] Since

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[17] Williams v. First Fed. Sav. & Loan Ass'n, *mem.* 500 F. Supp. 307, 309 (E.D. Va. 1980); *see* 651 F.2d at 914 n.7. Jurisdiction for the Williams' declaratory judgment suit rested upon § 1331 of Title 28 of the United States Code. *Id.* Section 1331 allows all cases arising under the laws of the United States to fall within the jurisdiction of the federal district courts. 28 U.S.C. § 1331 Sup. IV (1980). The federal question in *Williams* was whether the passing of beneficial interests to the Williamses constituted a sale or transfer under the federal regulation permitting "due-on-sale" clauses. 651 F.2d at 912 n.2; *see* 12 C.F.R. § 545.8-3(f), (g) (1980). Three separate cases attacking "due-on-sale" clauses were consolidated under the Williams caption for trial, with a fourth case added on appeal. 651 F.2d at 912 nn 1&2.

[18] Williams v. First Fed. Sav. & Loan Ass'n, *mem.* 500 F. Supp. 307, 309 (E.D. Va. 1980).

[19] 651 F.2d at 916; text accompanying notes 26-32 *infra.*

[20] 651 F.2d at 921; text accompanying notes 45-61 *infra.* Alienability is the ability to transfer property from one person to another. *See* BLACK'S LAW DICTIONARY 66 (5th ed. 1979). The prohibition on unreasonable restraints on alienability began with Quia Emptores, The Statue of Westminster, 1290, 18 Edw. I, c. 1. *See* 651 F.2d at 921 n.25.

[21] 651 F.2d at 929; text accompanying notes 62-72 *infra.*

[22] 651 F.2d at 981 n.16.

[23] *Id.* at 929.

[24] *Id.* at 931.

[25] *Id.*

[26] *Id.* at 918. The Williamses argued that they had to acquire either a legal or equitable title from the landowner in order to activate the "due-on-sale" clause. *Id.* The term "equitable title" is the holding of beneficial interests by one person while the title of record is in another. *See* BLACK'S LAW DICTIONARY 807-08 (5th ed. 1979) (legal/equitable title distinction). Thus, in assigning her "beneficial interests" to the Williamses, the homeowner transferred

the term "title" traditionally encompassed only title to real property,[27] and because Virginia law defines a beneficiary's interests in a trust as personalty,[28] the Wiliamses argued that the assignment of beneficial interests in the land trust was not a transfer of title sufficient to activate the "due-on-sale" clause.[29] The *Williams* court noted, however, that whether the beneficial interests the Williamses received from the landowner constituted real or personal property was immaterial because by its terms the "due-on-sale" clause in the landowners' deed of trust operated if the owner sold or transferred the property or any interest therein.[30] Thus, the language of the "due-on-sale" clause drew no distinction between realty and personalty. Reasoning that the Williams' purchase of the beneficial interests, including the right to possession, constituted a purchase of an "interest" in real estate, the Fourth Circuit concluded that the assignment of beneficial interests in the land trust was a transfer of interest sufficient to activate the "due-on-sale" clause.[31] Moreover, the court noted that the Virginia statute on which the Williamses relied to define beneficial interests in land trusts as personalty, expressly states that the statute's provisions are not to affect any right that a creditor might assert against a trustee or beneficiary.[32]

The Fourth Circuit refused to accept the Williams' argument that because the court disagreed with their definition of the term "title" an ambiguity existed in the deed of trust.[33] Since courts normally resolve ambiguities in contracts against the party who drafted the document,[34] the

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an equitable title that, according to the Williams' argument, would activate the "due-on-sale" clause. *See* 651 F.2d at 918. The Williamses evaded this inconsistency by arguing further that a transfer of "title" sufficient to activate the "due-on-sale" clause could occur only by a transfer of real property. *Id.* The Williamses alleged that the beneficial interests they received constituted personalty and not realty. *Id.*; *see* note 28 *infra*. Accordingly, the Wiliamses contended that no transfer of realty took place. 651 F.2d at 918.

[27] Early federal cases held that the term "title" could apply only to real estate. *See* Jones v. Gould, 149 F. 153, 157 (6th Cir. 1906) (by strict definition, "title" applicable only to real estate and rarely used in relation to intangible objects); United States v. Hunter, 21 F. 615, 617 (C.C.E.D. Mo. 1884) (word "title" pertains to title in fee of real estate and not to mere leasehold).

[28] *See* VA. CODE § 55-17.1 (1950). Section 55-17.1 states that a beneficiary's interest in a land trust is deemed to be personalty. *Id. See also* Gately v. Gately, 316 F.2d 585, 587 (7th Cir. 1963) (certificate of beneficial interest deemed to be personalty by deed of trust).

[29] *See* 651 F.2d at 918.

[30] *See* 651 F.2d at 918 n.16; note 16 *supra*.

[31] *See* 651 F.2d at 918-19. The Fourth Circuit relied on a definition of "title" that included mere possession or a right to possession in determining that the Williams' beneficial interests constituted a form of title. *Id.*; *see* 2 BOUVIER'S LAW DICTIONARY 3281 (8th ed. 1914).

[32] See 651 F.2d at 918 n.12; note 16 *supra*.

[33] *See* 651 F.2d at 919.

[34] *See* 4 WILLISTON, CONTRACTS § 621 (3d ed. 1961) and cases cited therein. The rationale behind the rule that a contract is construed most strictly against its draftsman is that the draftsman can prevent errors and ambiguities in meaning by carefully choosing his words. *Id.* If the draftsmen fails to choose his words carefully, then he should bear the burden of any ambiguity. *Id.*

Williamses argued that the court should construe the ambiguity against Arlington.[35] The Fourth Circuit noted, however, that despite the Williams' claims that they did not hold title to the property, the Williamses, nonetheless, owned the occupied the property upon completion of their transaction with the original landowner.[36] Thus, the *Williams* court reasoned that no ambiguity existed in the deed of trust because the maneuvers of the landowner, when viewed together, comprised a transfer within the meaning of the "due-on-sale" clause.[37]

The Fourth Circuit also rejected the Williams' contention that their rights of enjoyment in the property constituted an "encumbrance" subordinate to the deed of trust.[38] In advancing the encumbrance argument, the Williamses sought to invoke language in the deed of trust expressly excluding a lien or encumbrance subordinate to the deed of trust from the operation of the "due-on-sale" clause.[39] While the Fourth Circuit conceded that all possessory interests or rights of enjoyment in the property are subordinate to a deed of trust,[40] the *Williams* court concluded that the Williams' right of enjoyment was not a lien or encumbrance, because the right of enjoyment did not serve the purpose of securing the obligation to Arlington.[41] Rather, the *Williams* court reasoned that the Williams' interest, whether deemed a real or personal property interest, was actually a fee simple beneficial ownership interest in the property.[42] Since a Virginia statute expressly prohibits classification of an ownership interest as an encumbrance,[43] the Fourth

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[35] *See* 651 F.2d at 919.

[36] *Id.* at 918.

[37] *Id.* at 920. The Williamses, by their various transactions with the homesowner, attempted to effect a conveyance of ownership rights without making a transfer of title. *Id.* at 917. The Fourth Circuit held that no ambiguity existed with respect to the word "title" because the Williams' deed of trust did not employ the term. *Id.* at 918 n.16. The Williams' "due-on-sale" clause did, however, contain the term "transfer." *See* note 16 *supra.* The *Williams* court noted that a determination of whether a transfer occurred required examination of the transaction as a whole. 651 F.2d at 919-20. Reasoning that after the transaction, the homeowner no longer owned and occupied the property but that the Williamses did, the Fourth Circuit concluded that the transactions constituted a transfer sufficient to trigger the "due-on-sale" clause. *Id.* at 920.

[38] *Id.* The Williamses received the right of enjoyment in the homeowner's property as part of their assignment of beneficial interests. *Id.* at 917.

[39] *Id.* at 920-21. *See* 12 C.F.R. § 545.8-3(g) (1981). Section 545.8-3(g) provides in part:

> (1) . . . a Federal association may not exercise a due-on-sale clause based on any of the following:
>
> (a) Creation of a lien of encumberance subordinate to the association's security instrument.

Id. The Williams' deed of trust incorporated the provisions of § 545.8-3(g). *See* 651 F.2d at 920.

[40] *See* 651 F.2d at 920.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 920 n.22; *see* VA. CODE § 8.9-105(g) (1950). Section 8.9-105(g) states that an encumberance includes real estate mortgages and other rights that are not ownership inter-

Circuit held that the Williams' right of enjoyment did not constitute an encumbrance subordinate to the deed of trust preventing operation of the "due-on-sale" clause.[44]

In determining whether the "due-on-sale" clause was a restraint on alienation, the *Williams* court declined to decide whether the federal government had preempted any state regulation of "due-on-sale" clauses in the loan instruments of federal savings and loan associations.[45] While expressly disavowing any intent to discredit the many federal decisions validating "due-on-sale" clauses on the basis of preemption,[46] the Fourth Circuit stated that due to uncertainties resulting from the facts of the case,[47] the preemption question was best put aside.[48] The Fourth Circuit concluded, however, that standing alone, a "due-on-sale" clause cannot constitute a restraint on alienability.[49] A "due-on-sale" clause serves to remove a lien or encumbrance on the property by requiring payment of the balance of the mortgage.[50] Thus, the *Williams* court suggested that "due-on-sale" clauses enable land to become more, not less, alienable.[51]

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ests. *Id.* Since the Fourth Circuit reasoned that the Williams' rights of enjoyment constituted ownership rights, the rights of enjoyment could not qualify as an encumberance under Virginia law. 651 F.2d at 920 n.22.

[44] 651 F.2d at 920 n.22.

[45] *Id.* at 921; *see* note 5 *supra.*

[46] 651 F.2d at 922.

[47] *Id.* Three uncertainties that the *Williams* factual situation created precluded the Fourth Circuit from deciding the case on preemption grounds. *Id.* The first uncertainty arose because not all of the savings and loans employing "due-on-sale" clauses in *Williams* held federal charters. *Id.* The Fourth Circuit expressed doubt whether preemption could apply to a state chartered savings and loan. *Id.* Secondly, the Williams' entered into the deed of trust prior to the effective date of the federal "due-on-sale" regulations. *Id.* The *Williams* court noted that federal courts have conflicting views on whether preemption applies to the enforceability of agreements containing "due-on-sale" clauses entered into prior to the effective date of the federal regulations. *Id.*; *see* Conference of Fed. Sav. & Loan Ass'ns v. Stein, 495 F. Supp. 12, 17 (E.D. Cal.) (preemption applies whether contract entered into before or after effective date of federal regulations) *aff'd* 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.* 445 U.S. 921 (1980). *But see* Glendale Fed. Sav. & Loan Ass'n v. Fox, 481 F. Supp. 616, 633 (C.D. Cal. 1979) (preemption applies to contracts entered into after effective date of federal regulations). Finally, the federally-formulated deed of trust created an uncertainty by stating that the law of the jurisdiction in which the property is located controlled. 651 F.2d at 922.

[48] *Id.* at 923.

[49] *Id.* The *Williams* court found the Nebraska Supreme Court's decision in Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. 469, 471, 293 N.W.2d 843, 845 (1980), persuasive authority that "due-on-sale" clauses are not restraints on alienability for any purpose. *See* note 99 *infra.*

[50] *See* 651 F.2d at 923 n.29.

[51] *Id.* A fallacy exists in the position that "due-on-sale" clauses enhance alienability by removing the encumberance of the existing mortgage. A "due-on-sale" clause only accelerates the mortgage after sale of the property. *See* text accompanying note 2 *supra.* Since alienability describes the ability to transfer, a clause that activates after the sale cannot enhance alienability. Any purchase decision inevitably takes place before the clause becomes effective.

Moreover, the homeowner whose property is subject to a "due-on-sale" clause remains free to sell and realize as much on the sale of his property as a homeowner selling unencumbered land.[52] The Fourth Circuit noted that the effect of a "due-on-sale" clause from a market standpoint is merely to equalize the amounts realized from the sales of encumbered and unencumbered land by requiring the purchasers of both types of land to obtain financing at prevailing market rates.[53] Otherwise, the seller of encumbered property could demand and receive a higher price for his land because the purchaser could assume the seller's lower interest mortgage.[54]

Even if "due-on-sale" clauses were restraints on alienation the *Williams* court noted that the Virginia legislature sanctioned the clauses when it enacted statutes providing special notice requirements for mortgages containing "due-on-sale" clauses.[55] Generally, the need to obtain the prior consent of another before a sale of property can occur characterizes a restraint on alienation.[56] The Fourth Circuit observed, however, that the Williams' "due-on-sale" clause did not require the lender's consent before any sale of the property could occur, but only permitted the lender to accelerate the mortgage upon sale of the property without consent.[57] Although the law generally favors borrowers' rights over those of lenders, the Fourth Circuit emphasized that lenders, by complying with the law, acquire legally enforceable rights.[58] The *Williams* court held that Arlington had complied fully with the law because the "due-on-sale" clause did not require the lender's prior consent to a sale[59] and did not force the homeowner-seller to pay any penalty for prepayment resulting from activation of the "due-on-sale" clause.[60]

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[52] *See* 651 F.2d at 923 n.29.

[53] *Id.* at 915 n.8.

[54] *Id.*

[55] *Id.* at 924; *see* VA. CODE § 6.1-330.34 (1950). Section 6.1-330.34 of the Virginia Code requires mortgages containing a "due-on-sale" clause to provide a conspicuous notice that such a clause is part of the instrument. *Id.*

[56] *See* Pellerito v. Weber, 22 Mich. App. 242, 245, 177 N.W.2d 236, 237-38 (1970) (to declare forfeiture under clause requiring lender's consent prior to sale of property would constitute restraint on alienation). *See generally* Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests*, 58 IOWA L. REV. 747, 764 (1973).

[57] *See* 651 F.2d at 925; note 16 *supra*. Clauses that state that selling the property without the lender's consent constitutes a breach of contract are "disabling restraints" on alienability, which are unenforceable. *See* Lohmann v. Adams, ___ Okla. ___, ___, 540 P.2d 522, 555 (1975) ("disabing restraints" unenforceable per se). *See also* RESTATEMENT OF PROPERTY § 401(1)(a) (1944) (definition of "disabling restraint"). The *Williams* "due-on-sale" clause only allowed the lender to accelerate the mortgage upon the homeowner's violation of the clause. *See* note 16 *supra*. The clause did not deem a violation to be a breach of the deed of trust contract entitling the lender to damages. *Id.*

[58] 651 F.2d at 926.

[59] *Id.* at 928.

[60] *Id.*; *see* 12 C.F.R. § 545.8-3(g) (202) (1981); VA. CODE § 6.1-330.33 (1950). Both §§ 545.8-3(g)(2) and 6.1-330.33 prohibit the extraction of any prepayment fee or penalty from the homeowner-seller as the result of acceleration under a "due-on-sale" clause. *Id.* As for a

Consequently, the Fourth Circuit held that Arlington had a legal right to enforce the "due-on-sale" clause in the Williams' deed of trust.[61]

In determining whether the "due-on-sale" clause violated Virginia antitrust law, the *Williams* court noted that no evidence existed that Arlington's adoption of the "due-on-sale" clause was the result of any conspiracy or other prohibited combination.[62] The Fourth Circuit observed that each lender was able to perceive the benefits of "due-on-sale" clauses and institute their use.[63] Moreover, the *Williams* court noted that "due-on-sale" clauses specify only a time at which a lender may collect a mortgage debt.[64] Thus, the court concluded that the "due-on-sale" clause did not violate Virginia antitrust law because the mere collection of a debt cannot constitute an antitrust violation.[65] Additionally, the Virginia antitrust statute exempts from its application conduct governed by either a federal or state administrative agency.[66] Although one of the defendant savings and loans in *Williams* was state chartered,[67] the Fourth Circuit held that the state chartered savings and loan had sufficient contacts with federal agencies to allow the federal agencies to consider the anticompetitive effects of "due-on-sale" clauses.[68] Since federal agencies could govern the conduct of the state chartered savings and loan, the *Williams* court reasoned that the savings and loan's use of the "due-on-sale" clause fell within the statutory exemption of the Virginia antitrust law.[69] In addition, Virginia's antitrust law specifically exempts from its operation any conduct that is "authorized, regulated or approved" by a Virginia statute.[70] Reasoning that a Virginia statutory provision requires the use of a special printed notice of a "due-on-sale" clause on

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prepayment charge not accompanying a sale of the property, neither the Potes, plaintiffs in one of the consolidated cases, nor the Williamses could complain of an illegality on behalf of their respective lenders. *See* 651 F.2d at 928-29. A Virginia Code section limited any possible prepayment penalty to 2% of the amount prepaid. VA. CODE § 6.1-330.27.1 (1950). The maximum prepayment penalty chargeable under the terms of either the Potes' or Williams' deed of trust was 2%. *See* 651 F.2d at 928-29 nn. 40-42.

[61] 651 F.2d at 929.

[62] *Id.*; *see* VA. CODE § 59.1-9.5 (1950). Section 59.1-9.5 of the Virginia Code states that any combination, contract, or conspiracy in restraint of trade is unlawful. *Id.* The arguments that the "due-on-sale" clauses constituted restraints an alienation and per se violations of the antitrust law were solely the Potes'. *See* 651 F.2d at 912 n.2.

[63] *Id.* at 930.

[64] *Id.*

[65] *Id.*; *see* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 755-57 (1947) (amount owed under contract held collectable even though amount contained premium resulting from violation of antitrust law).

[66] *See* VA. CODE § 59.1-9.4(b)(2) (1950).

[67] 651 F.2d at 922. Washington-Lee Savings & Loan, the Potes' lender, was not federally chartered. *Id.*

[68] *Id.* at 930. The Fourth Circuit noted that Washington-Lee Savings & Loan was intimately related to the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Bank Board because these agencies developed and approved the deed of trust that Washington-Lee used. *Id.*

[69] *Id.*

[70] *Id.* at 931; *see* VA. CODE § 59.1-9.4(b)(1) (1950).

any mortgage containing such a clause,[71] the Fourth Circuit concluded that "due-on-sale" clauses are sufficiently authorized, regulated or controlled by Virginia statute to be exempted from operation of the antitrust law.[72]

The Fourth Circuit reasoned correctly that the assignment of beneficial interests in the homeowner-seller's property constituted a transfer of title in the property sufficient to activate the "due-on-sale" clause in the deed of trust.[73] By its terms, the "due-on-sale" clause did not distinguish between a transfer of interest in realty and an interest in personalty.[74] Rather, the lender provided that a sale or transfer of "any" interest incident to the homeowner-seller's property would activate the "due-on-sale" clause in the deed of trust.[75] Since the homeowner's sale or transfer of the "beneficial interests" in the property was clearly the transfer of an interest in the property, the "due-on-sale" clause was activated when the Williamses purchased the "beneficial interest" in the homeowner's land trust, the corpus of which was the property subject to the Arlington deed of trust. Moreover, the assignment of the "beneficial interests" in the land trust granted the Williamses the complete right to enjoy, occupy, and use the land in perpetuity.[76] Courts have held traditionally that a full right of occupancy or possession may constitute a form of title to real property.[77] The Fourth Circuit was correct, therefore, in defining the transfer of beneficial interests, including a full right of possession in perpetuity, to constitute a transfer of title in the property sufficient to activate the "due-on-sale" clause. Moreover, the *Williams* court properly refused to apply the doctrine of ambiguity to

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[71] 651 F.2d at 931. *See* VA. CODE § 59.1-9.4(b)(1) (1950).

[72] 651 F.2d at 931. Congress has designated the Federal Home Loan Bank Board an agency of the United States. 12 U.S.C. § 1437(b) (1976). The Federal Home Loan Bank Board promulgated the "due-on-sale" clauses at issue in *Williams*. 651 F.2d at 914 n.6 & 7. Consequently, the creation of the "due-on-sale" clauses in *Williams* is the act of a federal agency.

[73] 651 F.2d at 919 n.16.

[74] *Id.*; *see* note 16 *supra*.

[75] 651 F.2d at 914 n.7; note 16 *supra*.

[76] 651 F.2d at 917.

[77] *See* United States v. Shoeshone Tribe, 85 Ct. Cl. 331 (1937), *aff'd*, 304 U.S. 111 (1938); Singleton v. State, 260 N.C. 451, 459, 133 S.E.2d 183, 189 (1963).

In *Shoshone*, an Indian tribe sued the United States to recover the value of timber and minerals that the federal government removed from the tribe's reservation. 304 U.S. at 111. In holding for the plaintiff, the Court of Claims stated that although legal title of the reservation belonged to the United States, the right of occupancy was the real ownership and the full title to the property. 85 Ct. Cl. at 375. The Supreme Court affirmed stating that the right of occupancy was as "sacred as the fee" itself. 304 U.S. at 115. An analogy exists between the *Shoshone* facts and those of *Williams*. In *Shoshone*, the United States held legal title to the property in question, but the Shoshones had the right of occupancy. *Id.* In *Williams*, the land trust held the legal title to the home while the Williamses possessed the right of occupancy. *See* note 15 *supra*. *See also* Garlock v. Fulton County, 116 Pa. Super. 50, 52, 176 A. 38, 39 (1935) (although lowest form of title, possession is good against anyone not having better title).

the Arlington deed of trust.[78] Courts only should apply the ambiguity doctrine to construe a document whose language is ambiguous and unclear.[79] Since the Arlington deed of trust stated expressly that a transfer of "any" interest in the property would activate the "due-on-sale" clause,[80] no ambiguity existed concerning whether the transfer of only the beneficial interests in the property could activate the clause.[81]

The Fourth Circuit's conclusion that the Williams' right of enjoyment in the property did not constitute an encumbrance subordinate to the deed of trust that would preclude application of the "due-on-sale" clause also appears sound. Courts traditionally classify the right of enjoyment in property as an attribute of ownership.[82] Since Virginia law excludes all ownership interests from the statutory definition of encumbrance,[83] the Fourth Circuit properly classified the Williams' right of enjoyment as an ownership interest and not an encumbrance subordinate to the deed of trust.[84] Moreover, the encumbrance exception in deeds of trust was intended originally as a very limited exception to the operation of due-on-sale clauses.[85] If courts defined an encumbrance to include rights of enjoyment, the encumbrance term could encompass any interest created in property, and thereby preclude enforcement of all due-on-sale clauses.[86]

Federal courts previously have not addressed whether a "due-on-sale" clause constitutes a prohibited restraint on alienability.[87] The absence of clear federal precedent forced the Fourth Circuit to turn to state court decisions for judicial precedent concerning whether "due-on-sale" clauses constitute restraints on alienability.[88] State courts have divided, however, concerning whether "due-on-sale" clauses used for

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[78] 651 F.2d at 919; notes 34 & 37 *supra*.

[79] *See* Williams Schluderberg-T.J. Kurdle Co. v. Trice, 198 Va. 85, 88-89, 92 S.E.2d 374, 377 (1956); People's Bank v. People's Nat'l Bank, 148 Va. 651, 659-60, 139 S.E. 325, 327 (1927).

[80] *See* note 16 *supra*.

[81] 651 F.2d at 919.

[82] *See* Buchanan v. Wharley, 245 U.S. 60, 74 (1917) (ownership of property includes free use, enjoyment, and disposal). *Accord*, BLACK'S LAW DICTIONARY 997 (5th ed. 1979).

[83] *See* VA. CODE § 8.9-105(g) (1950); note 43 *supra*.

[84] *See* 651 F.2d at 920; note 82 *supra*.

[85] *See* 651 F.2d at 920. The limited scope intended for the encumbrance exception to the operation of a "due-on-sale" clause is demonstrated by statements from Federal Home Loan Bank Board and Federal Home Loan Mortgage Corporation officials that the encumbrance exception only applies to the creation of a lien on the borrower's interest. *See Dunn & Nowinsky*, *supra* note 5, at 302.

[86] 651 F.2d at 920.

[87] *See Enforcement*, *supra* note 3,; *Dunn & Nowinsky*, *supra* note 5 (comprehensive report discussing only state cases on alienability issue). Federal preemption grounds decided previous federal cases holding "due-on-sale" clauses to be valid and enforceable. *See* note 5 *supra*. The *Williams* court, however, declined to address the preemption question because particular facts of the case rendered the applicability of the preemption doctrine uncertain. *See* note 47 *supra*.

[88] 651 F.2d at 923-25.

portfolio management purposes constitute restraints on alienability.[89] Several state courts have held that "due-on-sale" clauses by their nature unreasonably restrain alienability, and thus, should be enforced only when the lender can establish that the sale of the encumbered property would impair or jeopardize the security for the underlying loan.[90] Other state courts hold, however, that "due-on-sale" clauses do not restrain alienability and are fully enforceable.[91]

Courts refusing to enforce "due-on-sale" clauses as restraints on alienability focus generally on whether the lender can establish sufficient legitimate interests to justify use of the clause.[92] Employing a balancing test, courts weigh the quantum of restraint that a "due-on-sale" clause imposes on alienability against the justifications favoring enforcement.[93] Courts, however, do not consider portfolio maintenance a legitimate interest of the lender's sufficient to outweigh the "due-on-sale" clause's restraining effect on alienation because enforcement of the

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[89] *Compare*, Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. 469, ____, 293 N.W.2d 843, 845 (1980) ("due-on-sale" clause does not restrain alienation and use of clause for portfolio maintenance is equitable); Mills v. Nashua Fed. Sav. & Loan Ass'n, No. 80-259 (N.H. S. Ct. August 10, 1981) ("due-on-sale" clauses not restraints on alienation); Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 615 S.W.2d 333, 339 (Tex. Civ. App. 1981) ("due-on-sale" clause cannot be classified as restraint on alienation) *with* Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 952, 582 P.2d 970, 976, 148 Cal. Rptr. 379, 385 (1978) ("due-on-sale" clauses used for portfolio maintenance constitute unreasonable restraint on alienability); Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n, 73 Mich. App. 163, 167, 250 N.W.2d 804, 809 (1977) (same); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, ____, 481 S.W.2d 725, 729 (1972) (same). *See generally* Comment, *Due-On Clauses: Restraints on Alienation And The Legitimacy Of Portfolio Maintenance*, 14 WILLAMETTE L.J. 295, 301 (1978).

[90] *See* Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 952, 582 P.2d 970, 976, 148 Cal. Rptr. 379, 385 (1978); Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n, 73 Mich. App. 163, 168, 250 NW.2d 804, 809 (1977).

[91] *See* Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 615 S.W.2d 333, 339 (Tex. Civ. App. 1981); Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. 469, ____, 293 N.W.2d 843, 845 (1980).

[92] *See* Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 951, 582 P.2d 970, 975, 148 Cal. Rptr. 379, 384 (1978); Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n, 73 Mich. App. 163, 168, 250 N.W.2d 804, 809 (1977); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, ____, 481 S.W.2d 725, 729 (1972).

The California Supreme Court's decision in *Wellenkamp* is representative of state court decisions refusing enforcement of "due-on-sale" clauses for portfolio maintenance purposes. In *Wellenkamp*, the court addressed the issue of whether "due-on-sale" clauses constitute unreasonable restraints on alienability. The *Wellenkamp* court concluded that the lender's interest in maintaining its loan portfolio at current rates of interest did not justify the restraint that "due-on-sale" clauses place on alienation. 21 Cal. 3d at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385. The *Wellenkamp* dissent, however, strongly criticized the majority opinion for putting a heavy economic burden on savings and loans in order to guaranty the homeowner-seller a low-interest transferrable mortgage for which he never bargained. 21 Cal. 3d at 957, 582 P.2d at 979, 148 Cal. Rptr. at 388. The Fourth Circuit adopted the arguments of the *Wellenkamp* dissent in *Williams*. *See* 651 F.2d at 923 n.29.

[93] *See* Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 949, 582 P.2d 970, 974, 148 Cal. Rptr. 379, 383 (1978).

clause would not further the original objective of "due-on-sale" clauses of protecting against impairment of security.[94] Lenders providing long-term real estate loans take into account projections of future economic conditions when determining the original interest rates on a particular loan.[95] Accordingly, courts holding that "due-on-sale" clauses constitute unreasonable restraints on alienability refuse to place the burden of the lender's faulty economic projections on the landowner-seller via the clauses, unless enforcement is necessary to preserve the lender's security interest in the property.[96]

State court decisions holding "due-on-sale" clauses not to be restraints on alienation rely generally on the Restatement of Property as authority.[97] Restatement section 404 defines a restraint on alienation as an attempt by an otherwise effective conveyance or contract to cause a later conveyance to be void,[98] to impose contractual liability on the conveyor for breach of an agreement not to convey,[99] or to terminate all or part of the property interest conveyed.[100] Since the effect of a "due-on-sale" clause in making the balance of the mortgage due and payable[101] is not one of the effects that the Restatement expressly prohibits, some courts reason that "due-on-sale" clauses do not constitute prohibited restraints on alienation.[102]

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[94] *See* Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 953, 582 P.2d 970, 977, 148 Cal. Rptr. 379, 386 (1978); Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n, 73 Mich. App. 163, 174, 250 N.W.2d 804, 806-07 (1977); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, ____, 481 S.W.2d 725, 729 (1972).

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

[96] *See id.*

[97] *See* Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 615 S.W.2d 333, 338 n.15 (Tex. Civ. App. 1981); Mills v. Nashua Fed. Sav. & Loan Ass'n, No. 80-259 (N.H. S. Ct. Aug. 10, 1981); Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. 469, ____, 293 N.W.2d 843, 845 (1980). The Nebraska Supreme Court's decision in *Occidental* is representative of state court decisions upholding "due-on-sale" clauses against restraint on alienability attacks. In *Occidental*, the court considered the question of whether "due-on-sale" clauses constitute restraints on alienability. 206 Neb. at ____, 293 N.W.2d at 845. The *Occidental* court relied on the Restatement of Property in holding that "due-on-sale" clauses in no way restrain alienability. *Id.* The Nebraska Supreme Court rejected the *Wellenkamp* holding and criticized the *Wellenkamp* court for putting an unreasonable burden on lenders stemming from the lender's increased exposure to economic harm during inflationary periods when "due-on-sale" clauses are unenforceable. 206 Neb. at ____, 293 N.W.2d at 847-49. The *Williams* court accepted the *Occidental* holding. 651 F.2d at 923 n.29. The Fourth Circuit also recognized the economic policy underlying the *Occidental* decision. *Id.* at 930 n.47; *see* text accompanying notes 112-18 *infra*.

[98] *See* RESTATEMENT OF PROPERTY § 404(1)(a) (1944) (definitions of restraints on alienability).

[99] *Id.* § 404(1)(b).

[100] *Id.* § 404(1)(c).

[101] *See* text accompanying note 2 *supra*.

[102] *See* Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 615 S.W.2d 333, 339 (Tex. Civ. App. 1981); Mills v. Nashua Fed. Sav. & Loan Ass'n, No. 80-259 (N.H. S. Ct. Aug. 10, 1981); Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. 469, ____, 293 N.W.2d 843, 845

The position of the Fourth Circuit in *Williams* upholding "due-on-sale" clauses appears sound. First, the balancing test that some courts use in determining whether a "due-on-sale" clause is a "reasonable" restraint on alienation when used for portfolio maintenance,[103] assumes that the rights and needs of the seller outweigh those of the lender.[104] The balancing test, however, disregards the fact that the seller and lender freely have entered into a contract to the contrary.[105] Secondly, the homeowner-seller is not disadvantaged due to the lender's use of a "due-on-sale" clause because, under a standard mortgage, the lender never promises that a third party can assume the seller's mortgage.[106] Moreover, if the lender cannot adjust its loan portfolio via "due-on-sale" clauses, the seller of encumbered property obtains a premium for sale of the land at the expense of the lender.[107] The seller's premium results from free market economic forces. When mortgage money is difficult to obtain, the seller of encumbered property whose mortgage does not contain an enforceable "due-on-sale" clause can provide automatic financing at lower than market rates of interest to any purchaser willing to assume the seller's mortgage.[108] A buyer may be willing to pay a premium over what the property would cost unencumbered as consideration for the privilege of assuming the seller's mortgage at the lower than market interest rate.[109] Thus, the seller's assumable mortgage may

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(1980). Courts holding "due-on-sale" clauses unenforceable begin generally with the assumption that "due-on-sale" clauses are restraints on alienability. *See* Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. at ____, 293 N.W.2d at 845; *Enforcement, supra* note 3, at 898-201. The court then employs some form of balancing test to determine if the lender's interests make the existing restraint reasonable. *See* Wellenkamp v. Bank of Am., 21 Cal. 3d at 948, 582 P.2d at 973, 148 Cal. Rptr. at 383. The state courts holding "due-on-sale" clauses to be enforceable, however, compare the effect of a "due-on-sale" clause with the Restatement definition of a restraint on alienation and find "due-on-sale" clauses not to be restraints in any way. *See* Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. at ____, 293 N.W.2d at 845. Since the courts upholding "due-on-sale" clauses do not begin their analysis with the assumption that "due-on-sale" clauses are restraints on alienability, and because the courts subsequently determine that "due-on-sale" clauses do not constitute restraints in any way, the courts never reach the reasonable restraint issue.

[103] *See* text accompanying note 93 *supra.*

[104] *See* Occidental Sav. & Loans Ass'n v. Venco Partnership, 206 Neb. at ____, 243 N.W.2d at 847. The balancing test courts use to determine whether "due-on-sale" clauses constitute reasonable restraints on alienability assumes that the lenders' rights are secondary to those of the homeowner because the test requires the lender to justify its rights before the court will recognize them. *Id.*

[105] *Id.* The lender and homeowner contractually have given priority to the lender's rights by allowing the lender to include a "due-on-sale" acceleration clause in the mortgage. At the same time, the homeowner has not contracted for guaranteed assumability of his mortgage. *Id.*

[106] *Id.* at 848.

[107] *Id.*

[108] *See* Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 957, 582 P.2d 970, 979, 148 Cal. Rptr. 379, 388 (1978) (Clark, J., dissenting).

[109] *Id.*

become a valuable asset to the seller.[110] If "due-on-sale" clauses are not enforced for portfolio management purposes, the seller of encumbered property may acquire an unbargained for advantage over the seller of similar, unencumbered land.[111]

Strong policy considerations also support the Fourth Circuit's holdings that "due-on-sale" clauses are enforceable and that the intricate maneuvers of the *Williams* homeowner-seller activated the "due-on-sale" clause. Savings and loan associations provide a majority of all residential mortgages in the United States.[112] The term of the average savings and loan mortgage for previously occupied homes, however, extends far longer than 25 years.[113] In periods of rising interest rates, savings and loan associations are vulnerable to economic pressures stemming from investment portfolios that are heavy with long-term, fixed-rate investments.[114] Savings and loan profits may decline due to an increasing differential between the rising rate of interest the savings and loan is forced to pay to attract new depositors and the fixed rate of interest the savings and loan earns from its long-term loans.[115] Savings and loan profits also may fall because of increased costs to the savings and loan resulting from the necessity of borrowing funds at prevailing market rates to compensate for funds that depositors withdraw and place into other, more lucrative, investments.[116] Moreover, a dual risk falls on lenders who cannot use "due-on-sale" clauses. When market interest

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[110] *Id.*

[111] *Id.* at 955, 582 P.2d at 977, 148 Cal. Rptr. at 377.

[112] *See Enforcement, supra* note 3, at 895 n.6.

[113] *Id.*

[114] *See* Occidental Sav. & Loan Ass'n v. Venco Partnership, 206 Neb. 469, ____, 293 N.W.2d 843, 849 (1980).

[115] *See id.* Without "due-on-sale" clauses, savings and loans are locked into long-term, fixed-rate investments. *Id.* The funds necessary to make the investments (loans) come primarily from short-term savings accounts and certificates. *Id.* In order to continue attracting depositors, savings and loans must offer a return near the prevailing market rate. *Id.* As the cost of obtaining funds rises for the savings and loan, the differential between what the savings and loan must pay in interest to depositors and what the savings and loan earns from its long-term loans increases. *Id.* Thus, savings and loan profits decrease. *Id.* If the interest rate differential gets too large, the savings and loan may fail. *Id.*

[116] Savings and loan profits can decrease through disintermediation. *See Enforcement, supra* note 3, at 895 n.6. Disintermediation occurs when market interest rates exceed the interest rates available to depositors from savings and loans, and the depositors take their money out of the savings and loans and invest elsewhere. *See* BLACK'S LAW DICTIONARY 421 (5th ed. 1979). In periods of rising interest rates, the liquidity of savings and loans steadily decreases due to disintermediation. *See Enforcement, supra* note 3, at 895 n.6. To acquire extra funds, the savings and loan must borrow on the open market. *Id.* The subsequent heavy borrowing at high rates forces profits down. *Id.* "Due-on-sale" clauses provide a safety valve that allows a savings and loan to keep investments earning current market rates. *See* Ashley, *Use of "Due-On" Clauses To Gain Collateral Benefits: A Common-Sense Defense*, 10 TULSA L.J. 590, 593-94 (1975) [hereinafter cited as Ashley]. At the same time, "due-on-sale" clauses work to improve liquidity by allowing savings and loans to call loans upon sale of encumbered property or require refinancing at current rates. *Id.*

rates fall, the savings and loan will lose high-yielding investments due to prepayment.[117] Rising market rates preclude the lender from updating the yield from its loan portfolio by using "due-on-sale" acceleration.[118]

As a result of the importance of savings and loans in the American housing market and their financial jeopardy in prolonged periods of inflation, lenders now increasingly utilize "due-on-sale" clauses and other protective devices.[119] In light of the policy underlying "due-on-sale" clauses of protecting savings and loan profits and liquidity,[120] the Fourth Circuit's decision in *Williams* that a transfer of beneficial interests in property activated the "due-on-sale" clause,[121] and that the "due-on-sale" clause was enforceable when triggered,[122] constitutes a sound choice in today's economy. A contrary holding would provide a convenient method for homeowners to circumvent the "due-on-sale" clause and consequently endanger the financial stability of savings and loan associations. Moreover, by resolving the alienation issue in favor of the savings and loan, the Fourth Circuit has established federal precedent that "due-on-sale" clauses are not by nature restraints on the alienability of land. The sound reasoning of the *Williams* court arguably may influence the previous positions that state courts have taken in rejecting the enforceability of "due-on-sale" clauses for portfolio maintenance purposes.

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[117] A savings and loan faces exposure to a double risk when it cannot use "due-on-sale" clauses. *See Enforcement, supra* note 3, at 896. The double risk stems from the borrower's ability to prepay the balance of the mortgage due if market rates fall and refinance elsewhere. *Id.* The savings and loan then has lost a high interest investment and is left with funds to lend at a less desirable rate. *Id.* On the other hand, if rates rise, the savings and loan cannot take advantage of the higher rates because it cannot accelerate the loan contract via a "due-on-sale" clause. *Id.*

[118] *Id.* at 896-97.

[119] *Id.* at 896 n.6. *See generally* Cowan & Foley, *New Trends in Residential Mortgage Finance*, 13 REAL PROP. PROB & TR. J. 1075 (1978). One protective device that savings and loans use in periods of inflation is the variable rate mortgage (VRM). *Id.* A VRM charges a rate of interest that is tied to an economic index of average mortgage rates. *See* 12 C.F.R. § 545.604(c) (1981). If market rates fall, the savings and loan must lower the rate on each VRM. *Id.* Alternatively, if market rates rise, and savings and loan may increase the VRM interest rate. *Id.* Both increases and decreases of VRM rates must remain within certain limits. *Id.*

Another protective device is the renegotiable rate mortgage (RRM). An RRM is a loan issued for a period of three, four, or five years and automatically renewable at equal intervals thereafter. *See* 12 C.F.R. § 545.6-4(a) (1981). Other RRM's bear a single term of thirty years with the interest rate automatically renegotiable every four or five years. *Id.* Interest rates adjust up or down within certain limits according to an economic index. *Id.*

[120] 651 F.2d at 930 n.47. *See* text accompanying notes 112-18 *supra.*

[121] 651 F.2d at 919 n.16. *See generally* Ashley, *supra* note 116, at 593 (policy of protecting savings and loan liquidity); Volkmer, *The Application Of The Restraints On Alienation Doctrine To Real Property Security Interests*, 58 IOWA L. REV. 747, 796-99 (1973) (policy of protecting savings and loan profitability).

[122] 651 F.2d at 931.