ARTICLE:
HIGHER RATE REDUX: RECALLING THE LEGAL HISTORY OF "TRANSFERS SUBJECT TO," WRAP-AROUND MORTGAGES, ASSUMABLE LOANS, AND THE DUE ON SALE CLAUSE IN A NEW ERA OF RISING INTEREST RATES

*By Karl E. Geier**

As residential mortgage interest rates have nearly tripled over the past 18 months, some participants in the real estate industry have been considering ways to market and sell real estate by keeping low-rate existing mortgages in place while transferring ownership of the property to a new owner or buyer.[1] This is the first time in well over a generation since the specter of high interest rates generated so much interest in "creative financing." Many participants in the industry today have no memory of the legal developments precipitated by the last period of rapidly rising rates, now some four decades in the past. While interest rates have yet to approach the stratospheric levels of the early 1980s, this is a propitious time to review the extensive and fairly definitive statutory and case law that emerged in that era, and remind ourselves of the limited possibilities for keeping the benefits of an existing low-rate mortgage loan while transferring the property to a new owner.

Transfers of Ownership "Subject to" an Existing Loan and the Effect of a Due-on-Sale Clause

In the abstract, although not often in practice, the mere fact that a mortgage or deed of trust is of record and secures a debt owing by the seller to the holder of the indebtedness, gives the mortgagee or beneficiary no control over who owns the property. The property remains freely alienable by the owner and the mortgagee cannot prevent a transfer of the property.[2] A transferee who does not contractually assume liability for the indebtedness has no personal liability to pay the debt, but the property remains subject to the mortgage, which continues to secure the indebtedness.[3] A seller or transferor may or may not have personal liability for payment of the loan, whether before or after transferring the property, but the lender's first recourse is to the property security.[4] Even if personally liable, the transferring seller will have the protection of the one-action rules as

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well as the laws of suretyship requiring the lender to exhaust security before pursuing a deficiency.[5] The non-assuming transferee has no personal liability regardless of the operation of the anti-deficiency laws, and the nominally liable borrower who transfers the property also has the benefit of the one-action rules as well as the anti-deficiency statutes.[6] In the case of one-to-four unit residential property, the operation of these rules typically leaves the seller with no practical exposure for a deficiency judgement against the seller's other assets. This is so particularly in light of the expanded "purchase money" anti-deficiency rules enacted in the past 10 years, which extend the non-recourse character of a purchase money loan secured by one-to-four unit residential property to a refinance of the portion of a prior loan that was used to purchase the property.[7]

The foregoing limitations on the lender's recourse should not be understood as eliminating risks from a "subject to" transaction, particularly for a purchaser who incurs additional debt or makes a substantial cash downpayment in acquiring the property subject to the existing loan. Most institutional loan transactions include a due-on-sale clause, which gives the lender the option to accelerate the indebtedness and call the loan due in case of a sale or other transfer of the property securing the debt without the lender's consent. In some few and rare cases (so rare as to be essentially unheard of when the existing loan has been obtained from an institutional lender or a participant in the secondary mortgage market), the loan will not include a due-on-sale clause and the lender will not have the option to call the loan due on sale or transfer. In the vast majority of cases, however, there will be a due-on-sale clause giving the lender the option to accelerate the loan and require it to be paid in full regardless of whether the loan installments continue to be paid—an option the lender is most likely to exercise when the existing loan bears interest at a rate below current rates on new loans. Once the lender accelerates the loan and notices a default to begin the foreclosure process, there is no right to "reinstate" the loan by bringing payments current, because the entire loan must be paid or else the lender will have the absolute right to complete the foreclosure.[8] This forces the non-assuming buyer now in title to refinance at current rates, in a distress situation, or lose their equity in the property, which is a risk few buyers will be willing to undertake.

As a result, the question of whether the loan includes an enforceable due-on-sale clause is of paramount importance if the parties want to keep existing financing in place at current low rates while transferring the property security to a new owner.

Strategies to Avoid the Operation of the Due-on-Sale Clause and the *Wellenkamp v. Bank of America* Decision

In the mid-1970's, mortgage interest rates were rising well above 10 percent and approaching 20 percent, and a number of strategies, with varying degrees of legitimacy and success, were developed by creative brokers and purchasers in an effort to circumvent the due-on-sale clause. One of these was the use of an installment land contract or a "wrap-around" or "all-inclusive" deed of trust to disguise the sale. Under these strategies, the buyer acquired the equitable ownership or actual title to the property, but the seller continued to make the payments to the lender from monthly installments paid by the buyer to the seller and no one informed the lender of the sale. The fact that the ownership of the property had transferred was disguised, and if the lender did not learn of the transfer, the strategy worked and kept the existing mortgage in place. However, as a matter of contractual interpretation, the transfer was a violation of the due-on-sale clause and the lender, once it discovered the transfer, was free to exercise the due-on clause, accelerate the loan, and foreclose, with the same consequences as if there had been an outright transfer "subject to" the mortgage. Sometimes a lender would agree to allow the transaction to stand, and consent to the wrap-around mortgage transaction, although this was rarely possible if the lender thought it had an enforceable due-on-sale clause. Sometimes it was also possible to argue the lender had "waived" the due-on-sale clause by continuing to accept payments after learning of the subterfuge, but well-advised lenders usually were able to avoid such arguments by acting promptly to exercise their remedies.

Another strategy, if it can be called that, was the argument that due-on-sale clauses were unenforceable per se, as unreasonable "restraints on alienation" in violation of California Civ. Code, § 711, so the property could be transferred in defiance of a lender's threat to exercise its right to accelerate. This strategy ultimately proved successful, although not without years of uncertainty. A series of reported California decisions drew the enforceability of such clauses into question in a variety of circumstances, including *Tucker v. Lassen Sav. & Loan Ass'n*[9] (holding automatic enforcement of a due-on-sale clause unreasonable where the property was transferred by installment land contract), and *La Sala v. American Sav. & Loan Ass'n*[10] (holding automatic enforcement of a due-on-encumbrance clause unreasonable where the property was subjected to a junior mortgage). These cases culminated with the seminal case of *Wellenkamp v. Bank of America,*[11] in which the California Supreme Court held that a due-on-sale clause giving the lender effective power to veto a transfer of ownership or to exact a large fee for agreeing to waive the clause, was an unreasonable and unjustifiable restraint on alienation and therefore unenforceable under the operation of § 711. This decision had the effect of validating many pre-*Wellenkamp* transfers. It also effectively vindicated the proponents of the "hide the ball" strategy of transferring subject to the mortgage without seeking the lender's consent while funneling payments through a straw man seller or through a wrap-around transaction. It also simplified the situation by allowing the parties to go ahead with a transfer of ownership, inform the lender of the change, and have the buyer begin making payments on the existing loan, knowing the lender was likely powerless to call the loan due merely because the property had been sold.

The *Wellenkamp* decision was issued on August 25, 1978. For the next four years, California borrowers were generally free to transfer property "subject to" an existing low-interest loan, and California lenders of both residential and commercial real estate loans were generally unable to call a loan due because of a transfer, even when made in direct defiance of a due-on-sale clause. *Wellenkamp* had ostensibly left the lender with the right to call the loan by reason of a transfer if it could demonstrate that doing so was necessary to avoid an impairment of its security or an increased risk of default,[12] giving the lender at least a superficial right to request credit information and other relevant documentation from the transferee. But actually accelerating the loan after receiving such information was still a fraught course of action for the lender and rarely successful.[13] Moreover, it was generally assumed in the marketplace that *Wellenkamp* applied to nonresidential loans, and this was eventually confirmed by the California Supreme Court in *Dawn Investment Co. v. Superior Court,*[14] involving a multiple unit apartment project, where the Court reiterated the holding of *Wellenkamp* in the context of a commercial transaction.

A large percentage of real estate transactions in California during the four years after *Wellenkamp* involved some form of creative financing, leaving existing lower-interest rate loans in place, transferring title subject to the existing loans, and using seller-carryback or institutional junior loans to cover the difference between purchase price and existing loan balances net of any cash down payment to the seller, as well as various other nonconventional "creative financing" techniques. Some lenders were even willing to issue "blended rate" mortgages refinancing their own existing lower interest loans with a larger purchase money loan that preserved the benefits of the lower rate on the existing loan balance. In general, lenders were stuck with the consequences of having made lower interest rate loans that continued in effect despite an environment of rapidly rising rates for new loans. The only exception was for loans originated by federal savings and loan associations, where the *Wellenkamp* decision was expressly preempted by regulations of the Federal Home Loan Bank Board making due-on-sale clauses enforceable by federal savings associations. Those regulations were upheld by the United States Supreme Court in *Fidelity Federal Savings & Loan Assn. v. de la Cuesta.*[15]

The Garn Act and Federal Preemption (including Exceptions to Enforceablity) as to Post-*Wellenkamp* Due-On-Sale Clauses

The free and easy post-*Wellenkamp* environment for sellers with existing lower-rate loans came to a screeching halt when the United States Congress enacted the federal Garn-St. Germain Depository Institutions Act of 1982.[16] This law, usually referred to as the shorthand "Garn Act," directly preempted state law restrictions such as *Wellenkamp,* and instead provided, with only limited exceptions discussed below, that a due-on-sale clause contained in a mortgage or deed of trust secured by real property, whether residential or commercial, was fully enforceable in accordance with the terms of the contract, without regard to any contrary state or local law, whether statutory or judge-made.[17] The Garn Act carved out certain "window period loans," i.e., loans that were originated after decisions such as *Wellenkamp*, which remained subject to the pre-Garn Act state law rules for a short period of time before also becoming subject to the preemptive effect of the Act, but it made all new loans after the date of its enactment in 1982 subject to the general rule of enforceability regardless of any such state law restrictions.[18] The Garn Act was supplemented by federal regulations that fleshed out the statutory preemption of state law and clarified the operation of the statute with regard to commercial real estate or other non-residential loans.[19] As a result, the marketplace adjusted to the limited transferability of property subject to existing loans, and the era of creative financing, with or without participation by the existing lender, for the most part ended.

However, while the Garn Act effectively overruled *Wellenkamp* and similar cases, rendering all due-on-sale clauses in real estate financing documentation fully enforceable by the lender in accordance with the contractual terms of the instrument, the Act also created certain exceptions to enforceability *that* *continue to this day* with respect to all such clauses in post-1982 loan transactions, *but only those involving one-to-four family residential properties* (including condominiums, cooperative apartments, and manufactured homes). These exceptions prohibit a lender from accelerating such a residential loan by reason of any of the following:[20]

(1) the creation of a lien or other encumbrance subordinate to the lender's security instrument that does not relate to a transfer of rights of occupancy in the property;

(2) the creation of a purchase money security interest for household appliances;

(3) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(4) the granting of a leasehold interest of three years or less not containing an option to purchase;

(5) a transfer to a relative resulting from the death of a borrower;

(6) a transfer where the spouse or children of the borrower become an owner of the property;

(7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;

(8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and that does not relate to a transfer of rights of occupancy in the property; or

(9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board. (This regulatory authority was later shifted to the Comptroller of the Currency.)

The regulations issued under the foregoing statutory provisions have clarified some of these exceptions, and the Comptroller of the Currency's current version of these regulations prohibits the exercise of a due-on-sale clause only where the property consists of one to four residential dwellings and secures a loan *originally* *made to an owner-occupant of the property,* and that also falls within one of the following categories:[21]

(i) The creation of a lien or other encumbrance subordinate to the lender's security instrument that does not relate to a transfer of rights of occupancy in the property, *provided,* that such lien or encumbrance is not created pursuant to a contract for deed;

(ii) The creation of a purchase-money security interest for household appliances;

(iii) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(iv) The granting of a leasehold interest that has a term of three years or less and which does not contain an option to purchase (that is, either a lease of more than three years or a lease with an option to purchase will allow the exercise of a due-on-sale clause);

(v) A transfer, in which the transferee is a person who occupies or will occupy the property, which is:

(A) A transfer to a relative resulting from the death of the borrower;

(B) A transfer where the spouse or child(ren) becomes an owner of the property; or

(C) A transfer resulting from a decree of dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse becomes an owner of the property; or

(vi) A transfer into an inter vivos trust in which the borrower is and remains the beneficiary and occupant of the property, unless, as a condition precedent to such transfer, the borrower refuses to provide the lender with reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy.

The specific limits of these exceptions and their applicability in the current interest rate environment are the most significant continuing effects of the

Garn Act, once it is accepted that the Act eliminated the argument that a due on sale clause is presumptively unenforceable by the lender.

Limitations and Opportunities Afforded by the Garn Act in the Current Interest Rate Environment

To be clear, there is no basis in the Garn Act or the ensuing federal regulations for arguing that a non-residential property subject to a commercial real estate loan can be transferred without lender consent (unless directly authorized by the terms of the contract), or that a transfer of such property without lender consent, where required, can occur without giving the lender a right to accelerate under the terms of the loan documents. There is also no credible basis for arguing that the "owner occupancy" requirement for residential loans is unenforceable and that loans made to non-occupant owners of investment property, residential or otherwise, are subject to these restrictions. Even if there were a basis for extending the Garn Act's exceptions to enforceability to such excluded commercial or investor-oriented loans, however, the usual terms of such loans, with short maturity periods of five to seven years, often with adjustable interest rate provisions, would leave little value for the parties to preserve by keeping an existing loan in place on transfer. The only situation where long-term fixed rate loans at historically low interest rates commonly exist is in the context of single family or one-to-four unit residential loans, and the exceptions to enforceability created by the Garn Act provide some clear opportunities for the owners of such properties in the current market of rising interest rates.

For those one-to-four unit residential loans originally made to owner-occupant borrowers, and otherwise compliant with the Garn Act, the Act provides a clear basis for avoiding a due-on-sale or due-on-encumbrance clause regardless of the terms of the contract, so long as the transfer or encumbrance falls within one of the enumerated exceptions. Perhaps most useful is the Act's effective provision of an avenue for some intrafamilial and inter-generational transfers of a personal residence to occur while retaining the benefit of a low-interest existing loan. Transactions that fall within the enumerated exceptions do not require prior consent or approval by the lender, and do not depend upon the execution of any particular documentation at the lender's behest. The one salient additional requirement imposed by the Comptroller's regulation, which is not express in the statute, is that the *transferee* must be acquiring the home as an owner-occupant, either by replacing the original borrower as owner-occupant, or by joining as a co-owner and co-occupant of the property. The latter alternative could be a valuable option when the property includes both a primary residence and an accessory dwelling unit or other secondary unit allowing for continued occupancy by a selling parent and a purchasing child or other eligible relative.

It is not entirely clear that a parent or other owner-occupant transferring property to one of the permitted transferee relatives can also carry back a note secured by a junior deed of trust for a portion of the purchase price without running afoul of the first clause (junior financing allowed so long as it does NOT involve a change of occupancy) or whether the same clause would allow the transferee to obtain a junior loan from a third party lender in connection with an intrafamilial transfer subject to the existing loan. In both cases, the language of the first clause would only allow a junior mortgage or deed of trust where unrelated to a change of occupancy, but that limitation was a device to prevent a sale transaction disguised as a loan and may not apply in an otherwise permitted transfer under the other clauses referred to above. In any case, there is nothing to prevent a transfer subject to an existing loan where no additional consideration or only unsecured debt or cash is used to pay the parent or other permitted transferor's equity in excess of the amount of the existing loan.

Assumable Loans by Contract

The Garn Act and the regulatory exceptions do not require an assumption of the loan in one of the enumerated situations where the transfer is effectively allowed without regard to the contractual terms of the due-on-sale clause or any applicable state law restrictions. Some loans also include contractual provisions allowing an assumption by a transferee without regard to the exceptions created by the Garn Act. These contractual provisions ordinarily will be given effect and provide another avenue for possible retention of a below-market rate in the current environment. Some federal loan programs, including VA loans and FHA loans, are required to be assumable, while other private loan programs sometimes also include assumption provisions. Unlike the Garn Act's express permission of certain specific and limited types of "subject to" transfers without consent or approval by the lender, an assumption requires an application process and approval by the lender under standards specified in the particular program or loan documentation. This can be time-consuming and difficult to accomplish in a transaction with a short closing period, because most lenders have neither the incentive nor the staffing needed to expedite such requests. As a consequence, the number of assumption transactions in the current market is anecdotally said to be minimal.[22] While the assuming party may be required to meet other underwriting standards, including credit standing and income requirements, these provisions are not typically dependent on a specific relationship between seller and buyer, and may or may not be contingent on continued owner occupancy by the transferee.

An assumption of a loan effectively results in the liability for repayment being transferred to the party acquiring the property and assuming the loan and may or may not include a release by the lender of the original borrower from liability on the loan.[23] In a high percentage of cases, the original borrower, as a practical matter, has no personal liability for the loan as a result of the effects of California anti-deficiency laws, and an assumption of liability by the transferee also poses little risk of actual liability, but the effect of a default by the successor owner may still have adverse consequences for the transferor's credit standing as well as the transferee's, so a release of liability of the original borrower is still desirable.

While post-Garn Act case law on transfers with or without lender consent is scarce, one area that is deserving of mention in the context of loan assumptions is the possible operation of California case law concerning the implied covenant of good faith and fair dealing and "unconscionability" in negotiations for assumption of a loan governed by California law. The Garn Act's imprimatur that the rights of the lender are governed strictly by the contractual terms of the loan documents does not entirely preempt state contract law principles; as stated in the current federal regulations, "the exercise of due-on-sale clauses in loans originated by lenders other than Federal savings associations shall be governed exclusively by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by that contract."[24] This language is supplemented by another narrowly worded provision that lenders' "due on sale practices . . . shall be governed exclusively by the OCC's regulations, in preemption of and without regard to any limitations imposed by state law on either their *inclusion or exercise* including, without limitation, state law prohibitions against restraints on alienation, prohibitions against penalties and forfeitures, equitable restrictions and state law dealing with equitable transfers."[25] Although this language directly limits application of the "unreasonable restraints on alienation" doctrine established by *Wellenkamp* to current due-on-sale provisions and their exercise, it does not eliminate the other provisions of state law that determine the rights and obligations of the parties under a contract, including the interpretation of contract provisions and the duty not to deprive the other party of the benefits of the contract in bad faith or for improper purposes.

Also bearing emphasis is that the federal regulations implementing the Garn Act contain some language giving the lender the right to require the grantee to execute an agreement assuming liability under the loan and changing the interest rate to a rate the lender requests, and mandating that the lender release the original borrower from liability as a condition of waiving its right to accelerate under an otherwise enforceable due-on-sale clause.[26] This language only applies where the lender "waives its option to exercise a due-on-sale clause as to a specific transfer."[27] Thus, it would *not* apply to a grantee succeeding to the ownership of the property under one of the enumerated exceptions to enforceability of a due-on-sale clause set forth in the Garn Act. However, it *would* apply where the parties request approval of an assumption and a *waiver* of the due-on-sale clause, whether or not the loan contains an express assumption provision. Beyond that requirement, however, there is nothing in the Garn Act or its regulations that would exempt a lender obligated by contract to accept an assumption under specified terms and conditions from its implied duty to administer that requirement in good faith so as not to deprive the borrower of the benefits of the express terms of the contract governing assumption.[28]

Conclusion

The current rising interest rate environment follows more than a decade of historically low mortgage interest rates, and many existing loans would be highly attractive to a home buyer and increase value of the home seller's equity if the current low rate could be passed through to the new owner. Unfortunately, because of the Garn Act, opportunities for preservation of the existing loan terms on sale to an arms-length third party will be limited to those owner-occupied loans that are contractually assumable or made so by express federal regulations. However, the Garn Act and the regulations issued under the Garn Act provide several exceptions allowing transfers or encumbrance of residential properties subject to existing loans to owner-occupants without regard to the presence of a due-on sale clause for certain intra-family transfers as well as transfers on death or dissolution of marriage. These exceptions, which are binding on all lenders, not solely those operating under federal charters, should be considered whenever there is an existing loan that may benefit the parties by remaining in place after the transfer.

ENDNOTES:

[1]See, for example, the recent article entitled *A 7% Mortgage Rate In a Grim 7% World? A Startup Sees Gold,* Wall Street Journal, September 14, 2023, at page 1.

[2]*Aitchison v. Bank of America Nat. Trust & Savings Ass'n*, 8 Cal. 2d 400, 403-404, 65 P.2d 890 (1937); *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383, 53 P. 813 (1898).

[3]*Braun v. Crew*, 183 Cal. 728, 731, 192 P. 531 (1920); *Andrews v. Robertson*, 177 Cal. 434, 437-438, 170 P. 1129 (1918).

[4]See *University of Redlands v. Ford*, 56 Cal. App. 2d 151, 152, 132 P.2d 238 (4th Dist. 1942).

[5]See discussion in 5 Miller & Starr, California Real Estate 4th, §§ 13:38, 13:40.

[6]Civ. Proc. Code, §§ 580b, 580d, 726.

[7]Civ. Proc. Code, § 580b, subds. (a)(3), (b).

[8]This follows from the enforceability of the due-on-sale clause by the lender, which renders the entire obligation due and payable in full, at which point there is no basis for payment of a delinquent installment or to otherwise perform a recurring obligation that is subject to reinstatement under Civ. Code, §§ 2924, 2924c. The acceleration is not reversible by tender of a partial payment if a sale or transfer has triggered the lender's acceleration of the debt, and the trustor's only option is to redeem the property from the mortgage by paying the full amount due. See 5 Miller & Starr, California Real Estate 4th, §§ 13:173, 13:240 to 13:241.

[9]*Tucker v. Lassen Sav. & Loan Assn.*, 12 Cal. 3d 629, 116 Cal. Rptr. 633, 526 P.2d 1169 (1974).

[10]*La Sala v. American Sav. & Loan Assn.*, 5 Cal. 3d 864, 97 Cal. Rptr. 849, 489 P.2d 1113 (1971).

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

[12]*Id*. at 953 ("[A] due-on clause contained in a promissory note or deed of trust cannot be enforced upon the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." [footnotes omitted]).

[13]See *Santa Clara Savings & Loan Assn. v. Pereira*, 164 Cal. App. 3d 1089, 1094, 1096-1097, 211 Cal. Rptr. 54 (1st Dist. 1985) (grantee utterly failed to respond to lender's reasonable requests for credit information, which court of appeal held could justify lender's acceleration under the language of *Wellenkamp* quoted in the preceding endnote, although "[a]dmitttedly under *Wellenkamp* and subsequent cases the burden [the] lender carries in such circumstances is a heavy one").

[14]*Dawn Investment Co. v. Superior Court*, 30 Cal. 3d 695, 180 Cal. Rptr.

332, 639 P.2d 974 (1982).

[15]*Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982).

[16]Oct. 15, 1982, 96 Stat. 1505; Pub. L. 98-181, title I [title IV, § 473], Nov. 30, 1983, 97 Stat. 1237.

[17]12 U.S.C.A. § 1701j-3.

[18]For an extended discussion of the Garn Act's transitional "window period loan" provisions—now essentially "dead letter law"—see Geier, *Due-on-Sale Clauses under the Garn-St. Germain Depository Institutions Act of 1982*, 17 U.S.F.L.Rev. 356, 372 to 413 (1983).

[19]Previously, 12 C.F.R. Pt. 591, §§ 591.1 to 591.5, later recodified at 12 C.F.R. Pt. 191, §§ 191.1 to 191.5.

[20]12 U.S.C.A. § 1701j-3(d).

[21]12 C.F.R. Pt 191, § 191.5(b)(1).

[22]See, for example, the Wall Street Journal article cited in the first endnote of this article, above, which indicates fewer than two hundred loan assumption transactions have occurred nationwide under the FHA and VA loan assumption programs.

[23]The legal effect of an "assumption" as distinguished from a "subject to" transfer is discussed at length in 5 Miller & Starr, California Real Estate 4th § 13:39.

[24]12 C.F.R. § 191.4(b).

[25]12 C.F.R. § 191.5(a) (emphasis added).

[26]12 C.F.R. § 191.5(b)(4).

[27]*Id.*

[28]See, by analogy, the case law developed under the federal Home Affordable Modification Program (HAMP), where a lender has offered an interim trial period agreement (TPP) as part of a workout negotiation and thereby becomes subject to state law contract remedies despite the absence of a federal cause of action for violation of the underlying federal law by the lender. E.g., *Fleet v. Bank of America N.A.*, 229 Cal. App. 4th 1403, 1409-1410, 178 Cal. Rptr. 3d 18 (4th Dist. 2014); *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 797-798, 154 Cal. Rptr. 3d 285 (4th Dist. 2013); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 565-566 (7th Cir. 2012).

