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Decision 84 06 092 JUN 6 1984

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the feasibility of establishing various methods providing low-interest, long-term financing of solar energy systems for utility customers.	OII 42 Petition for Modification (Filed July 1, 1983)

O P I N I O N

Southern California Gas Company (SoCal) seeks an order modifying Decision (D.) 92251 (September 16, 1980) to permit purchasers of real property on which solar water heating systems have been installed to assume the loans made by SoCal to finance those systems.

Background

In D.92251 the Commission ordered SoCal to offer solar loans at 6% interest to be repaid in monthly installments over 20 years or on sale of the residence, whichever occurred first. (D.92251 at pp. 30-31.) The Commission also required SoCal to record security instruments on all properties on which it made loans for solar water heating systems. (Id. at p. 38.) SoCal interpreted D.92251 to prohibit foreclosure under the security instrument except when authorized by the Commission. Accordingly, SoCal has employed as a security instrument a subordinated deed of trust and assignment of rents (a copy is attached to the petition.) which does not permit the trustee to foreclose on and sell the property until expressly permitted by the Commission.

SoCal alleges that an increasing number of its solar loan debtors have refused to pay off the loan upon sale of their property. Instead, they offer to have the purchaser assume the solar loan. As of the filing date of the petition, ten debtors have sold

their property and refused to repay their loan in full; and purchasers in most of these instances have tendered the regular monthly payments. SoCal states that because the solar loans generally have a term of 20 years, it expects this problem to continue and grow. SoCal believes that it is prohibited by law from foreclosing in most of these situations, but it states that members of the Commission's Legal Division do not share its opinion. SoCal believes that public policy reasons justify modification of D.92251 to permit assumption of solar loans on the sale of the property.

SoCal asked the Commission to modify D.92251 to authorize it to permit the assumption of solar loans by purchasers of real property securing such loans. It requests that it be authorized to permit such assumptions at its discretion, so that it may attempt to accelerate full payment on sale where feasible or where there is demonstrable danger of waste of the security or where the purchaser is not credit worthy. However, if the Commission refuses to allow assumption, SoCal requests that the Commission direct and authorize it to foreclose if loans are not paid in full on sale.

D.92251

In D.92251 the Commission established the demonstration solar financing program. One aspect of that program was the low-interest loan to finance solar water heating systems for single-family residences. In discussing the appropriate interest rate to require on such loans the Commission stated:

> "Our selection of an interest rate is based on our desire to obtain information on consumer response

> to economically comparable incentives offered as loans and credits. Having decided that a $20 per month credit for 48 months is an appropriate credit to offer in the single-family gas water heater market, we conclude that a loan of 6% for 20 years offers a comparable incentive to the consumer in present value, assuming a typical loan is repaid within eight years on sale of the home." (Emphasis added.) (D.92251, p. 30.)

The Commission later described its program for single-family gas water heater retrofits, as follows:

> "Both utility credits and utility loans shall be available for single-family gas water heater retrofits. Utility credits shall be $20 per month for 48 months payable quarterly or until sale of the home, whichever occurs first. ($960) Utility loans shall be at 6% interest to be repaid with monthly payments over 20 years or upon sale of the residence, whichever occurs first. We find these credit and loan terms to be economically comparable incentives which should provide a clear evaluation of consumer preference, if any, during the demonstration program. The utility shall not promote either loans or credits as a preferred option. The utility shall cease making loans when one-half of targeted number of single-family gas participants have received a utility loan." (D.92251, p. 30-31.)

Also, in D.92251 the Commission discussed the question of security for the low-interest loans and concluded:

> "It seems imprudent to ask the ratepayers to provide financing assistance in the form of loans without providing even minimal security for repayment. Thus, we will require the utilities to record security instruments on all properties on which they make loans for solar water heater retrofits. These security instruments shall be restricted in two ways. First, a utility shall not be able to foreclose for nonpayment, but shall recover proceeds of the loan only upon sale or transfer of the property. Any payments not made in a timely fashion shall accrue interest at the rate of 14% per year until paid. Second, the utility security shall be subordinated to all other liens until one day prior to sale or transfer of the property." (D.92251, p. 38.)

Terms of Deed of Trust

SoCal uses as part of its solar loan program a subordinated deed of trust and assignment of rents (deed of trust). The deed of trust confers upon the trustee a power of sale of the trust property, but such power is restricted by paragraph 10 of the deed of trust, which provides:

> "The indebtedness secured hereby arises out of a Solar/Gas Water Heater Financing Program ordered by the California Public Utilities Commission. By order of said Commission, Beneficiary is presently not authorized, in the event of default of any provision hereof, to declare all sums secured hereby immediately due and payable and demand the sale of said property. Accordingly, Beneficiary shall not, until permitted by order of said Commission, demand the sale of said property, or except as provided in Paragraph 13 herein, declare all sums secured hereby immediately due and payable."

Paragraph 13 of the deed of trust makes any indebtedness secured by it due and payable upon sale of the property.

Paragraph 15 makes the terms of the deed of trust apply to and binding upon all parties to the deed of trust and their legal representatives and successors in interest.

SoCal's Legal Argument

SoCal's contentions fall into two categories: First, it believes that it is prohibited by law from foreclosing in most situations, and second, public policy reasons justify modification of D.92251 to permit assumption of solar loans on sale of the property.

SoCal cites Wellenkamp v Bank of America (1978) 21 Cal 3d 943, wherein the California Supreme Court held that due-on-sale

clauses could not be enforced by an institutional lender unless it could show that there was danger of waste of the property or that the purchaser was not credit worthy. In a later case, Dawn Co. v Superior Court (1982) 30 Cal 3d 695, the Supreme Court applied the Wellenkamp rule to private lenders, including vendors who take back seconds, and to investment as well as residential property.

In Wilhite v Callihan (1982) 135 Cal App 3d 295 the Court of Appeals applied the Wellenkamp rule to a small short-term loan. A private lender had attempted to enforce a due-on-sale clause in a second deed of trust with a balance owing of $2,132.05. Less than one year remained in the term of the loan at the time of the attempted trustee sale. The court prevented the sale based on the Wellenkamp rule and held the lender liable for the purchaser's attorney fees.

SoCal states that it is unaware of any cases of outright sale of property subject to a due-on-sale clause where the court has held Wellenkamp inapplicable. However, SoCal cites in an accompanying footnote a U.S. Supreme Court case, Fidelity Federal S&L Association v de la Cuesta, (1982) 458 U.S. 141, 73 L Ed 2d 664 where the Court held that loans made by federally-chartered financial institutions can be made due on sale. Cal-Vet loans are also due on sale. (Dept. of Veterans Affairs v Duerksen (1982) 138 Cal App 49.)

SoCal points out that Federal legislation enacted in October 1982 (PL 97-320) will substantially repeal the Wellenkamp rule. However, SoCal interprets PL 97-320 to exempt from its

application for at least three years those loans made prior to its date of enactment (12 USC 1701j-3). The federal act also permits the California Legislature to permanently exempt such loans from federal repeal of Wellenkamp. Although SoCal had already made the bulk of its loans before October 1982, new loans have been made since that time. SoCal may be able to collect new loans on sale of the property but believes it should treat old and new loans in the same manner.

SoCal's Policy Argument

SoCal's policy arguments in favor of assumption of the obligation by the purchaser of the property may be summarized as follows:

1. SoCal is prevented by D.92251 from allowing a credit worthy purchaser to assume the obligation of the solar loan.
2. Even if Wellenkamp does not apply, SoCal could not foreclose without specific authorization by the Commission.
3. SoCal is barred from suing the borrower personally on the loan agreement due to the "one-action rule" in Code of Civil Procedure, § 726.
4. Under the orders as currently framed it would seem that SoCal is required to reject payments proffered by the purchaser.
5. Therefore, it appears logical to allow assumption of the loan in order that the regular monthly payments, rather than nothing, be recovered. Otherwise, uncollected debt would be charged to the conservation cost adjustment (CCA) mechanism and the ratepayers would suffer.

SoCal concedes that the only real alternative to assumption of the solar loan by the purchaser of the real property is foreclosure, but argues that the consequences are unacceptable both

for the Commission and for SoCal. SoCal's arguments against the foreclosure alternative may be summarized as follows:

1. SoCal's foreclosure of a delinquent loan and sale of the customer's house could create a negative public event. The Commission might share in any unfavorable publicity because of a Commission order directing or authorizing SoCal to foreclose.
2. Unfavorable publicity could have a negative effect on other conservation programs operated by SoCal and other utilities under Commission direction.
3. The Commission has been disinclined toward utility foreclosure on customers' real property. (D.92251 in OII 42 and D.82-02-135 in A.60447.)
4. If SoCal attempted to foreclose it might be forced to litigate the applicability of Wellenkamp. Such litigation could be costly and could expose SoCal to suit for having wrongfully interfered with the underlying property transaction.

SoCal believes that if solar loan assumptions are permitted no unacceptable consequences will occur. It intends to make every reasonable effort to collect solar loans upon sale of the property securing the loan. It agrees that the cost to the ratepayer for the solar program will be minimized if the repayment of loans can be accelerated. However, where borrowers resist acceleration of the loan upon sale, SoCal contends that assumption is the only reasonable alternative.

SoCal understands that if loans cannot be accelerated on sale, the cost-effectiveness of the solar retrofit loan program may be reduced. However, it points out that the solar loan program was adopted as a demonstration and that the Commission did not require it to meet cost-effectiveness criteria.

Discussion

While there are several reasons why Wellenkamp should not be extended to solar loans under the solar demonstration financing program, we rely chiefly on the general principle that the Commission is governed by the Public Utilities Code[1] and not by the provisions of other California Codes wherein the Commission is neither named nor included by comprehensive language, e.g. "all state agencies". Thus, when a Commission order is challenged in the California Supreme Court, the "review of that order" shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State." (§ 1759; emphasis added). The Commission's authority is specified by the provisions of the Public Utilities Code. However, from time to time the Legislature has seen fit to narrow the Commission's authority by requiring it to observe specific provisions in other codes. For example, § 451 defines adequate telephone facilities by reference to Civil Code § 59.1.[2] Conversely, the Legislature has named the Commission in other Codes and has thereby required it to comply with their provisions. For example, the open meeting laws (Government Code, §§ 11120 et seq.) apply to the Commission as do certain parts of the Administrative Procedure Act (Government Code, § 11351).

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1 "All hearings, investigations, and proceedings shall be governed by this part..." (Part 1, Public Utilities Act, §§ 201-2715 of the PU Code). (See PU Code § 1701.)

2 Other examples in the PU Code of this kind are: §§ 304, 320, 441, 496, 522, 770. 1002, 1211, 1758.

Wellenkamp was based upon the Court's interpretation of Civil Code § 711, which provides:

> "Conditions restraining alienation, when repugnant to the interest created, are void."

The central question raised by SoCal's petition for modification is whether CC § 711 is applicable to the Commission. If it is, then Wellenkamp is applicable as well. We conclude that it is not. Our position is grounded in our authority to set up the solar demonstration financing program in the first instance. If we had such authority, then CC § 711 cannot be said to override or condition it. If we did not have such authority, then our order requiring a due-on-sale condition would not be invalid because of CC § 711, but because we had not "regularly pursued our authority." (PU Code § 1759)

The California Supreme Court has held that the Commission's discretion is broad. (CLAM v PUC, 25 Cal 3d 891, 905-906 (1979)) Under Article XII, § 5 of the California Constitution, the Legislature has "plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the Commission..." Pursuant to this authority the Legislature has enacted various statutes directing the Commission in its regulation of public utilities and other businesses. While many of these statutes are more or less specific, some confer broad discretion upon the Commission. For instance, § 701 states:

> "The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient to the exercise of such power and jurisdiction."

The only limitation placed upon the Commission's broad discretion under § 701 by the California Supreme Court is that the Commission's

orders must be cognate and germane to the regulation of public utilities.

In addition to § 701 the Legislature also enacted § 702, which states:

> "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." (Emphasis added.)

These two companion sections clearly show the breadth of the Commission's discretion in regulating public utilities.

Both of these sections, among others, were cited by the Commission in D.92251, (where the Commission established the solar demonstration financing programs) in support of its assertion of authority to make that order. (4 CPUC 2d 258, 260, fn. 13). D.92251 and D.92501,[3] [which denied rehearing, were challenged in three petitions for writ of review.)[4] In its petition for writ of review TURN expressly challenged the Commission's authority to establish the solar demonstration financing program. However, the Supreme Court did not agree with TURN's contentions, for it denied its petition with the others without hearing.

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[3] 5 CPUC 2d 1 (1980)

[4] [Public Solar Power Coalition, et al. v CPUC, S.F. #24256, denied 3/23/81; T.U.R.N. v CPUC, S.F. #24257, denied 5/22/81; and Cal SEIA v CPUC, S.F. #24258, denied 3/23/81. None of these petitions cited Wellenkamp, although it was issued August 25, 1978, well before D.92251 was issued.]

Even if, for the sake of argument, we were to hold that CC § 711 and Wellenkamp applied to the Commission's orders, there is good reason to conclude that they do not apply to the solar demonstration financing program. In Department of Veterans Affairs v Duerksen, 138 Cal App 3d 149 (1982) the Court held that Wellenkamp does not apply to Cal-Vet contracts. The facts of that case and the court's reasoning are analogous to our solar loan program.

The facts of the Duerksen case are actually much more onerous than those posed by our solar loans. There the Cal-Vet contract prohibited transfer of the property without the prior written consent of the Department of Veterans Affairs (DVA) upon pain of acceleration of the loan. When Duerksen transferred the property to an ineligible purchaser without the DVA's consent, the DVA, under specific statutory provisions, demanded full payment of the outstanding balance. Receiving no response DVA cancelled the contract, forfeiting all payments thereunder, and sued to quiet title. The trial court granted DVA's motion for summary judgment and the Court of Appeals affirmed.

Under the Cal-Vet program the DVA may sell[5] farms and homes to eligible veterans at low rates of interest. (The DVA's interest rate at the time of trial was 7.85%.) Our solar loans are issued at a low rate of interest of 6%. Funds for the DVA's purchases are provided by the public through general obligation bonds. Our solar loans are funded by the public through the rates charged by the utility companies that issue the loans.

In Duerksen the Court observed that:

> "...the Wellenkamp rule is grounded in a statute - Civil Code Section 711. It is, of course, within the power of the Legislature to override the general prohibition against restraints on alienation embodied in Section 711 and amplified in Wellenkamp, by giving the Department statutory authority to restrain alienation in ways an ordinary lender may not. [Citations omitted] The Department contends this is what

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[5] These sales are under installment contracts. DVA retains title until the full amount of the contract is paid in full.

> the Legislature has done in enacting the [Veterans' Farm and Home Purchase] Act [of 1974]." (Military and Veterans Code, § 987.50 et seq.) (Duerksen at p. 154.)

The Court of Appeals agreed with this position when it affirmed the lower court's judgment. Although no specific provisions have been enacted in the PU Code similar to those giving the DVA authority to accelerate the loans upon unpermitted transfer of the property, still the Legislature has given the Commission very broad discretion in matters concerning the regulation of public utilities.[6] Pursuant to that authority the Commission has established a comprehensive demonstration program to explore what financing devices would expedite the installation of solar water heaters. The secured solar loan with acceleration upon transfer was one of the methods chosen by the Commission under its broad grant of regulatory authority.

In Duerksen the Court states:

> "The Department depends on early payoffs of existing contracts to provide a continuing source of money to make purchase for new veteran applicants; it also depends on being able to retake the property of veterans who violate their contracts and refuse to pay the accelerated debt. If Duerksen is allowed to transfer his property and escape the obligation to pay it off or give it back, other eligible veterans who have not enjoyed the benefits of the program--and who are willing to follow the ground rules--are deprived."

Although the number of solar loans is fixed, the Commission depended upon the acceleration clause to ensure that the loan program would provide a comparable incentive to the $20-per-month credit for 48 months. Thus, the Commission concluded that:

> "...a loan of 6% for 20 years offers a comparable incentive to the consumer in present value assuming the typical loan is repaid within eight years on sale of the home." (D.92251. p. 30)

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[6] See also PU Code § 2851 and Revenue and Taxation Code § 23601(j) for more specific authority.

To allow assumption of the solar loan upon sale of the home would destroy the comparability of the two methods of financing and would not "provide the clear evaluation of consumer preference" that the Commission's demonstration program was designed to elicit.

Finally. we point to one aspect of the Duerksen case which we believe is determinative of this case. The Court stated:

> "Distilled to its essence, Duerksen's contention is that he is entitled to reap all the advantages of the Act but suffer none of its detriments. The short answer to that contention is '[h]e who takes the benefit must bear the burden.' (CC § 3521.)"

Those that would contend that they are entitled to sell their homes and allow the buyer to assume the low-interest solar loan stand in the same position as Duerksen; they have had the benefits of a solar water heater with its accompanying tax credits and reduced utility bills; they have benefitted from the use of ratepayer supplied funds at below-market interest rates; and now they would seek to avoid the insignificant detriment of acceleration of that small loan upon sale of their homes. It seems clear to us that the result should be the same as in Duerksen: that CC § 711 and Wellenkamp should not apply.

There is additional reason to believe that the Wellenkamp rule would not apply to the solar loans. In Wellenkamp the Court set two tests to determine whether a particular due-on-sale clause should be enforceable: (1) the "quantum of restraint" imposed by the due-on-sale clause; and (2) the justifications for the due-on-sale clause.

In the case of the solar loans the quantum of restraint is minimal because:

1. The magnitude of the solar loans are small in comparison to the purchase prices of the underlying real properties or to the loans necessary to fund the purchases of single-family residential properties; and the acceleration of the solar loans would,

therefore, only incidentally affect the borrowers' ability to market their properties.

2. The benefits accruing to the borrower from the installation of a solar water heating system would enhance the marketability of the property sufficiently to offset, wholly or partially, any restraint accruing from the acceleration of the debt.

Since the restraint is either insubstantial or is offset by countervailing benefits from the solar water heating system, the amount of justification necessary to warrant the enforcement of the due-on-sale clause is lowered.

As to such justification, we first note that the due-on-sale clause is required by law, that is, by the order of this Commission. Insofar as the public utilities are concerned, they must include a due-on-sale clause in the deed of trust because we have required them to do so. Second, the interest of the public utility in the early retirement of its loans is different from that of an institutional lender. Since the public utility is administering ratepayer funds, it has a duty to insure that the restrictions on the use of those funds are not exceeded and that the cost-effectiveness of the solar loan program is maintained. Also, if some borrowers were allowed to sell their subsidized loans and others paid them off upon sale of the real property, discrimination would result in violation of PU Code § 453. In addition, the experiment of comparing loans to credits, which the Commission intended by setting up the demonstration program, would be destroyed. The economic benefit of a 6%, 20-year loan is vastly enhanced by the elimination of a due-on-sale clause; and at the same time, the comparability of the solar loan to the credit is destroyed. Who would not choose to borrow money at 6% if he knew it need not be paid off except by installments over 20 years? We believe the answer is obvious. It is equally obvious that the subsidized solar loan has economic value to

the owner of the solar water heater-equipped home. When he sells his home, he may be able to extract a higher price not only for the home so equipped, but for the assumable loan. Because of the assumable solar loan, the buyer does not need to borrow as much money from the lender at market interest rates, and the seller can thus exact a higher price for the property. We do not feel inclined to condone this potential for overreaching, all at the ratepayers' expense.

Accordingly, we conclude that the justification for the due-on-sale clause in our solar loan program overcomes any theoretical restraint on alienation.

We believe that SoCal exaggerates the potential negative effects of an attempted foreclosure. We doubt seriously that the media (once their representatives understand the facts), would view the average owner of a solar-equipped home as the hapless pawn of the powerful utility company. We also suspect that the typical solar loan debtors are astute, middle or upper-middle income homeowners. When faced with a demand for payment on pain of foreclosure, most sensible persons will evaluate the cost of paying off the loan (or the cost of alternative financing) agaist the cost, both psychic and monetary, of resisting the utility's demand through litigation. The amounts of these solar loans are small in comparison to purchase prices for or first loans on single-family residences. Thus, the potential gain from litigation is slight: merely the time value of the solar 20-year loan at 6% versus the time value at market rates. In light of the magnitude of the stakes, the likelihood of litigation is slight.

Even if litigation were to occur, the question of Wellenkamp's applicability could be settled in a single case. Once the issue is settled, all other similar transactions would be governed by that holding.

We are concerned that the solar loan program remain within the limits we have established so that loans and credits may be comparable and so that discrimination between debtors is avoided. We abhor the suggestion that assertive homeowners should be allowed to sell their subsidized loans to purchasers of their homes, while compliant homeowners pay them off upon sale. We conclude, therefore, that SoCal should be directed to demand payment of solar loans when the real property security is to be sold. If a homeowner should fail to pay off the loan pursuant to such a demand, then SoCal should direct its trustee to commence sale of the security under the deed of trust.

Conclusions of Law

1. The Commission is governed by the PU Code and by the provisions of other codes which name the Commission or include the Commission in general terms.

2. The Commission is neither named in CC § 711 nor does its language include the Commission in general terms.

3. CC § 711 does not purport to restrict a state agency acting within the scope of its authority from requiring a due-on-sale clause to be part of a deed of trust in a program established by it and executed by regulated public utilities.

4. The Commission's order in D.92251 was issued pursuant to the authority of the Commission conferred by §§ 701 and 702, among others.

5. The Commission's authority to establish the solar demonstration financing program was challenged by petition for writ of review, but the Court denied the writ.

6. Even if the above conclusions did not govern this case, neither CC § 711 nor Wellenkamp would apply because:

a. The principles discussed by the Court in Duerksen would govern;

b. The "quantum of restraint" imposed by the due-on-sale clause in the solar loan deeds of trust is minimal or offset by countervailing benefits; and the justification for the due-on-sale clauses is sufficient to overcome any theoretical restraint.

7. SoCal's policy arguments are entitled to only limited weight. The likelihood of litigation in response to an acceleration notice or attempted foreclosure sale is slight.

8. The integrity of the demonstration solar financing program requires that SoCal demand payment in full upon sale and foreclosure upon failure to pay.

O R D E R

IT IS ORDERED that:

1. Southern California Gas Company (SoCal) shall demand payment in full of the solar loans upon sale of the security, and,

upon failure of the debtor to pay as demanded, shall direct its trustee to commence foreclosure procedures under the deed of trust.

2. SoCal's petition for modification is denied.

This order becomes effective 30 days from today.

Dated JUN 6 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

clauses could not be enforced by an institutional lender unless it could show that there was danger of waste of the property or that the purchaser was not credit worthy. In a later case, Dawn Co. v Superior Court (1982) 30 Cal 3d 695, the Supreme Court applied the Wellenkamp rule to private lenders, including vendors who take back seconds, and to investment as well as residential property.

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Accordingly, we conclude that the justification for the due-on-sale clause in our solar loan program overcomes any theoretical restraint on alienation.[7]

We believe that SoCal exaggerates the potential negative effects of an attempted foreclosure. We doubt seriously that the media (once their representatives understand the facts), would view the average owner of a solar-equipped home as the hapless pawn of the powerful utility company. We also suspect that the typical solar loan debtors are astute, middle or upper-middle income homeowners. When faced with a demand for payment on pain of foreclosure, most sensible persons will evaluate the cost of paying off the loan (or the cost of alternative financing) agaist the cost, both psychic and monetary, of resisting the utility's demand through litigation. The amounts of these solar loans are small in comparison to purchase prices for or first loans on single-family residences. Thus, the potential gain from litigation is slight: merely the time value of the solar 20-year loan at 6% versus the time value at market rates. In light of the magnitude of the stakes, the likelihood of litigation is slight.

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[7] We note in passing that the Court's holding in Wellenkamp seems to excise the dependent clause in CC § 711, i.e., "when repugnant to the interest created." In the usual three-party real estate transaction (buyer, seller, and lender) the due-on-sale clause, the "condition" in the language of § 711, is included by the buyer at the lender's insistence in the deed of trust. The "interest created" by a deed of trust is a security interest. And a due-on-sale clause is certainly not "repugnant" to a security interest but is to the contrary in furtherance thereof. Thus, § 711 is impliedly amended to read: "Conditions restraining alienation are void."

6. Even if the above conclusions did not govern this case, neither CC § 711 or Wellenkamp would apply because:

a. The principles discussed by the Court in Duerksen would govern;

b. The "quantum of restraint" imposed by the due-on-sale clause in the solar loan deeds of trust is minimal or offset by countervailing benefits; and the justification for the due-on-sale clauses is sufficient to overcome any theoretical restraint.

7. SoCal's policy arguments are entitled to only limited weight. The likelihood of litigation in response to an acceleration notice or attempted foreclosure sale is slight.

8. The integrity of the demonstration solar financing program requires that SoCal demand payment in full upon sale and foreclosure upon failure to pay.

O R D E R

IT IS ORDERED that:

1. Southern California Gas Company (SoCal) shall demand payment in full of the solar loans upon sale of the security, and,