#72 10/27/72

First Supplement to Memorandum 72-71

Subject: Study 72 - Liquidated Damages

Senate Bill No. 1339 of the 1972 session (not enacted) contains a late payment charge provision. The provision applies where a real estate broker solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with a loan secured directly or collaterally by a lien on real property. The provision of Senate Bill No. 1339, with the staff's suggested revisions, reads as follows:

Sec. 5. Section 10242.5 is added to the Business and Professions Code, to read:

10242.5. A late charge may be collected on an installment on a loan governed by the provisions of this chapter ~~provided that~~ if the requirements of Section 2954.5 of the Civil Code and all of the following requirements are satisfied :

(a) The amount of such late charges and the conditions under which they may be assessed shall be set forth in the promissory note ~~; and~~ .

(b) No late charge may be collected on an installment which is paid in full within 10 days after its scheduled due date even though an earlier maturing installment or a late charge on an earlier installment may not have been paid in full. For purposes of this section , payments are applied first to current installments and then to delinquent installments.

(c) An installment shall be considered paid as of the date it is delivered if delivered in person or the date it is postmarked if delivered by mail.

(d) The amount of the late charge shall not exceed ~~10~~ four percent of the installment or five dollars ($5) whichever is less.

We suggest that this provision be added to the tentative recommendation relating to liquidated damages, but we suggest that the 10-percent limitation--subdivision (d)--be reduced to four percent. In connection with the need for the provision, see the newspaper article attached as Exhibit I.

We suggest that Section 2954.6 (page 8 of the tentative recommendation attached to Memorandum 72-71) be revised to conform to the above provision and read as follows:

2954.6. The default, delinquency, or late payment charge referred to in Section 2954.5 shall be subject to the provisions of that section and the following conditions:

(a) No default, delinquency, or late payment charge may be collected on aninstallment which is paid in full within 10 days after its scheduled due date even though an earlier maturing installment or a default, delinquency, or late payment charge on an earlier installment may not have been paid in full. For the purposes of this section, payments are applied first to current installments and then to delinquent installments.

(b) An installment shall be considered paid as of the date it is delivered if delivered in person or the date is is postmarked if delivered by mail.

(c) The amount of the default, delinquency, or late payment charge shall not exceed four percent of the installment or five dollars ($5) whichever is less.

We suggest that Section 3320 (page 12 of the tentative recommendation) be revised as follows to conform to the two provisions discussed above:

3320. (a) Subject to any other provision of law, the parties to a contract which requires periodic payments of money by one party to the

other may provide for a late payment charge to be imposed as liquidated damages for failure to make a payment when due if the requirements of this section are satisfied.

(b) Except as otherwise provided by law, a late payment charge shall be deemed to be reasonable and to satisfy the requirements of Section 3319 if the amount of the charge does not exceed five percent of the delinquent installment or five dollars ($5), whichever is less.

(c) No late payment charge may be collected on a payment which is paid in full within 10 days after its scheduled due date even though an earlier maturing payment or a late payment charge on an earlier payment may not have been paid in full. For purposes of this section, an amount paid is applied first to current payments and then to delinquent payments.

(d) A payment shall be considered paid as of the date it is delivered if delivered in person or the date it is postmarked if delivered by mail.

(e) Nothing in this section precludes the parties to a contract which requires more than one periodic payment of not less than $250 from providing for a specified late payment charge as liquidated damages if such provision satisfies the requirements of Section 3319 and all other applicable provisions of law other than this section.

(f) This section does not apply to any contract to which the Commercial Code applies.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Mortgage Bankers Facing Lawsuits; Usurious Financing Charges Alleged

By Steve Martini

SACRAMENTO — A $30 million class action suit alleging usurious finance charges assessed by a home loan mortgage broker has been filed in Sacramento Superior Court, adding to the list of suits pending against mortgage brokers in the state.

The suit, filed on behalf of Adelaide F. Henderson, a Sacramento resident who obtained a $1600 loan on a second deed of trust against her home, charges that the lender, and the broker who acted as a middleman in the transaction, have collected money in excess of the state's usury law.

The money is not strictly in the form of interest charges, but was assessed in terms of late charges, brokerage fees and interest. Since signing the note for the loan in late November 1969, the plaintiff has been hit with 20 late charges, amounting to $320, as well as brokerage fees amounting to $130. According to the complaint, these payments, along with $372.29 in interest were deducted from the plaintiff's monthly payments of $40.

The plaintiff is now left with a balance of $1,311.04 two years after taking out her $1600 thirty-six month loan.

According to information from spokesmen in the State Capitol, the predicament of Mrs. Henderson is not uncommon, and legislators are gearing up to deal with the problem in the 1973 legislative session.

In 1971, Leo Bromwich, a consultant to the Subcommittee on Human Needs and Resources, issued a stinging report outlining what he considered to be some of the gross inequities perpetrated by the home loan brokerage industry.

LEGISLATION

During the 1972 legislative session, Senators Mervyn Dymally, D-Los Angeles and Anthony Beilenson, D-Beverly Hills, co-authored a measure (SB 1339) aimed at regulating excessive late charges, balloon payments and prepayment penalties charged by the industry.

Since that time several court actions have been filed to obtain relief for specific persons injured by the late charges and high brokerage fees.

In September, a suit was filed in the San Francisco Superior Court on behalf of Belle Shaw, a 77-year-old widow on social security. Mrs. Shaw, who had obtained a loan on her home with American Plan Investment Corp. in Dec. 1969 for $1400, found herself two years later facing a loan balance in excess of $29,000.

The plaintiff had gone through six successive refinancings with the company when she found herself unable to meet the monthly payments. According to schedule prepared by legislative staff members following the fifth refinancing, Mrs. Shaw "had paid or become obligated to pay a total of $19,670 in expenses, commissions and interest in return for the privilege of borrowing $7,426."

The first case alleging unreasonable charged was filed in May of this year, and also named American Plan Investment Corp as the defendant. In that case, another 77-year-old widow, Mrs. Aileen Pick, a resident of Fairfax, faced foreclosure on her home as a result of her loan.

Mrs. Pick, who had borrowed $3000 to pay for her husband's funeral and back taxes on her home, had missed a payment to American Plan when she was forced into the hospital with ill health. As a condition of the loan, the plaintiff was compelled by the broker to take a 37 month loan rather than one for the standard 36 months. The extra month enabled the brokerage firm to double its fees, charging Mrs. Pick $300 rather than $150.

INJUNCTION

An injunction finally issued barring the sale of the home at a public auction, and the publicity that followed resulted in American Plan's President James Zissis calling off the trustee sale. Zissis himself paid off the lenders and said that Mrs. Pick could pay him back when the home was eventually sold.

Two weeks ago, Paul Cabbell, a former employe of Union Home Loan Brokers came to the Capitol to confer with legislative staffers on the brokerage problem. Cabbell, who worked for the brokerage firm for about a year, said that most brokers fail to comply with their responsibilities as fiduciaries.

"It is my opinion that not only does Union Home Loan not live up to that duty (to disclose)—but most of the industry fails to," he said.

Cabbell says that there are honest people in the industry, but adds that the current laws regulating the industry are weak. He says that the Attorney General and the Department of Real Estate—the industry's regulatory agency—are unable to deal with the problem.

Cabbell also opened up the possibility of a conflict of interest on the part of California Real Estate Commissioner Robert Karpe. He said that Karpe's father, Elmer Karpe holds an interest in a Bakersfield mortgage brokerage firm.

The Real Estate Commissioner admitted that his father does hold an interest in the Karpe Real Estate Center, in Bakersfield, adding that a

(1)

portion of the firm's business is in the area of extending loans on second deeds of trust. Karpe admitted that he himself owns an interest in that firm, but added that his interest is being held in a "blind trust" and that a full disclosure of these holdings was made to the Reagan Administration at the time he was appointed Real Estate Commissioner.

Karpe said that his father has been in the real estate business in Bakersfield for about 45 years, adding that he, Robert Karpe, was proud of the Karpe firm in that it charges about half of what other firms assess in the way of fees.

CONFLICT OF INTEREST

He said he believed that there was no possibility of a conflict of interest because he has nothing to do with management of the business, there was a full disclosure of the holding, and because an attorney in Bakersfield handles the trust fund. Karpe's father is involved in the management of the business.

A spokesman for the Governor's Office said that Karpe did make a full disclosure of his holdings, and has been cleared by the Administration. Karpe was appointed Real Estate Commissioner on April 1, 1971.

A critic of the brokerage industry, Cabbell, says that Karpe's firm indulges in unethical and illegal advertising. He refers to an advertisement in the Bakersfield Californian which says that Elmer F. Karpe (Karpe's father) will extend home loans to persons in the community, and says nothing about the fact that Karpe is a broker, acting as a middleman between lenders and borrowers.

Cabbell says that the advertisement clearly violates Sections 10235 and 10237.7 of the Business and Professions Code. He said that he asked Karpe about the violation, and Karpe responded that the law is really not clear on that point.

Cabbell said that a call to Karpe's assistant, Assistant Commissioner John Hempel resulted in Hempel stating that a violation of the statutes quoted was a major violation of the law.

According to another spokesman for the Real Estate Department, Chief Legal Officer Jerry Thomas, there are three major problem areas in the brokerage field. Thomas said that major problems arise with regard to late charges assessed by brokers, excessive brokerage commissions and balloon payments.

LATE CHARGES

Thomas said that late charges used to be a problem, though it is not nearly as significant as it used to be. He said that legislation enacted two years ago now requires brokers to notify borrowers before assessing a late charge.

Asked how the industry could justify late charges since the broker does not actually make the loan himself, but merely serves as a middleman, Thomas said that brokers do incur some costs as a result of servicing the loans. He said that most of these were clerical in nature.

Thomas also said that many brokers require a 37 rather than a 36 month loan in order to give the borrower a balloon payment and keep his monthly payments down. The consequence of the 37-month loan is that the broker can charge a 15 percent brokerage commission, as opposed to a 10 percent charge.

The attorney said that the biggest problem is the balloon payment itself. He said that borrowers should be made aware that they will be facing this payment so that they don't make monthly payments for two years only to find that they have not reduced the principal of the original loan.

Cabell offered statistics on the refinancing of balloon payments. He said that 50 percent of all loans are refinanced at the end of the loan period chiefly because borrowers cannot meet the balloon payment. He added that usually the amount of the refinancing is at least 50 percent of the original loan.

LUCRATIVE BUSINESS

Cabbell says that the brokerage business is an extremely lucrative business, with many brokers having a net worth in the six figures and some who are multi-millionaires. He pointed out that "investors are the key to the business and that borrowers are considered a dime a dozen."

The critic said that he has knowledge of a "strawman" in Los Angeles who maintains a "stable of lenders", who is contacted by brokers when they have a list of prospective borrowers.

He said that this "strawman", not identified by Cabbell, acts as a go-between for brokers and lenders—an additional layer of brokering. For his services, Cabbell said that this "strawman" gets a cut from the broker's fee.

Cabbell also said that three or four brokerage firms in the state do 90 to 95 percent of the business. Spokesmen for the Department of Real Estate said that the abuses which are cited by Cabbell are limited to only a few firms, but Cabbell says that these are the largest brokers.

Cabbell said that the average loan extended is for $3400, adding that Union Home Loan, the largest broker in the state, foreclosed on 67 percent of its loans in the past two to three years. He also said that some of recent advertising campaigns by the industry have been aimed at elderly retired persons, with loans being extended with an intent to foreclosure on their property.

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CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

ASSEMBLY BILL No. 2193

Introduced by Assemblyman Ralph

March 15, 1972

REFERRED TO COMMITTEE ON FINANCE AND INSURANCE

An act to add Section 1917 to the Civil Code, relating to loans.

LEGISLATIVE COUNSEL'S DIGEST

AB 2193, as introduced, Ralph (Fin. & Ins.). Loans.

Specifies maximum charge that may be imposed on late installment payment of a loan entered into after effective date of section which is secured by real property with four or less residential units or upon which four or less units are to be constructed, is 10 percent of the amount of the installment, but permits a $5 minimum charge when the late charge would otherwise be less than such minimum charge.

Vote—Majority; Appropriation—No; Fiscal Committee—No.

The people of the State of California do enact as follows:

SECTION 1. Section 1917 is added to the Civil Code, to read:

1917. The maximum charge that may be imposed by a lender for late payment of any installment on a loan entered into after the effective date of this section which is secured by real property containing four or fewer residential units or on which four or fewer residential units are to be constructed, is 10 percent of the amount of the installment; provided, however, that a minimum

charge of five dollars ($5) may be imposed when the late charge permitted by this section would otherwise be less than such minimum charge.

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AMENDED IN SENATE JULY 21, 1972

AMENDED IN SENATE JUNE 29, 1972

AMENDED IN ASSEMBLY MAY 26, 1972

CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

ASSEMBLY BILL No. 1516

Introduced by Assemblyman Pierson

March 15, 1972

REFERRED TO COMMITTEE ON FINANCE AND INSURANCE

An act to add Section 2954.4 to the Civil Code, relating to real property.

LEGISLATIVE COUNSEL'S DIGEST

AB 1516, as amended, Pierson (Fin. & Ins.). Real property.

Specifies maximum charge ~~or penalty~~ that may be imposed on late installment payment due on a loan secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling.

Provides loans made by specified lenders are not subject to provisions of this act.

Prohibits such charge ~~or penalty~~ being imposed more than once for the same late payment.

Defines "late payment."

Defines phrase, "single-family, owner-occupied dwelling."

Vote—Majority; Appropriation—No;
Fiscal Committee—No.

The people of the State of California do enact as follows:

SECTION 1. Section 2954.4 is added to the Civil Code, to read:

~~2954.1. (a) The maximum charge or penalty which~~ *2954.4. (a) A charge which* may be imposed for late payment of an installment due on a loan secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling ~~is~~ *shall not exceed the equivalent of* 10 percent of the installment due. No charge ~~or penalty~~ may be imposed more than once for the same late payment of an installment. A payment is not a "late payment" for purposes of this section until at least six days following the due date of the installment.

(b) This section is not applicable to loans made by a credit union subject to the provisions of Division 5 (commencing with Section 14000) of the Financial Code, by an industrial loan company subject to the provisions of Division 7 (commencing with Section 18000) of the Financial Code, or by a personal property broker subject to the provisions of Division 9 (commencing with Section 22000) of the Financial Code.

(c) As used in this section, "single-family, owner-occupied dwelling" means a dwelling which will be owned and occupied by a signatory to the mortgage or deed of trust secured by such dwelling within 90 days of the execution of the mortgage or deed of trust.

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AMENDED IN SENATE JUNE 29, 1972

AMENDED IN ASSEMBLY MAY 26, 1972

CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

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March 15, 1972

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Provides loans made by specified lenders are not subject to provisions of this act.

Prohibits such charge or penalty being imposed more than once for the same late payment.

Defines "late payment."

Defines phrase, "single-family, owner-occupied dwelling."

Vote—Majority; Appropriation—No;
Fiscal Committee—No.

The people of the State of California do enact as follows:

SECTION 1. Section 2954.4 is added to the Civil Code, to read:

2954.4. (a) The maximum charge or penalty which may be imposed for late payment of an installment due on a loan secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling is 10 percent of the installment due. No charge or penalty may be imposed more than once for the same late payment of an installment. A payment is not a "late payment" for purposes of this section until at least six days following the due date of the installment.

(b) This section is not applicable to loans made by a credit union subject to the provisions of Division 5 (commencing with Section 14000) of the Financial Code, by an industrial loan company subject to the provisions of Division 7 (commencing with Section 18000) of the Financial Code, or by a personal property broker subject to the provisions of Division 9 (commencing with Section 22000) of the Financial Code.

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AMENDED IN ASSEMBLY MAY 26, 1972

CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

ASSEMBLY BILL No. 1516

Introduced by Assemblyman Pierson

March 15, 1972

REFERRED TO COMMITTEE ON FINANCE AND INSURANCE

An act to add Section 2954.4 to the Civil Code, relating to real property.

LEGISLATIVE COUNSEL'S DIGEST

AB 1516, as amended, Pierson (Fin. & Ins.). Real property.

Specifies maximum charge or penalty that may be imposed on late installment payment due on a loan secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling.

Provides loans made by specified lenders are not subject to provisions of this act.

Prohibits such charge or penalty being imposed more than once for the same late payment.

Defines "late payment."

Vote—Majority; Appropriation—No; Fiscal Committee—No.

The people of the State of California do enact as follows:

SECTION 1. Section 2954.4 is added to the Civil Code, to read:

2954.4. *(a)* The maximum charge or penalty which may be imposed for late payment of an installment due on a loan secured by a mortgage or deed of trust on real

property containing only a single-family, owner-occupied dwelling is 10 percent of the installment due. No charge or penalty may be imposed more than once for the same late payment of an installment. A payment is *not* a "late payment" for purposes of this section ~~when not paid within~~ *until at least* six days following the due date of the installment.

(b) This section is not applicable to loans made by a credit union subject to the provisions of Division 5 (commencing with Section 14000) of the Financial Code, by an industrial loan company subject to the provisions of Division 7 (commencing with Section 18000) of the Financial Code, or by a personal property broker subject to the provisions of Division 9 (commencing with Section 22000) of the Financial Code.

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CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

ASSEMBLY BILL No. 1516

Introduced by Assemblyman Pierson

March 15, 1972

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An act to add Section 2954.4 to the Civil Code, relating to real property.

LEGISLATIVE COUNSEL'S DIGEST

AB 1516, as introduced, Pierson (Fin. & Ins.). Real property.

Specifies maximum charge or penalty that may be imposed on late installment payment due on a loan secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling.

Prohibits such charge or penalty being imposed more than once for the same late payment.

Defines "late payment."

Vote—Majority; Appropriation—No; Fiscal Committee—No.

The people of the State of California do enact as follows:

SECTION 1. Section 2954.4 is added to the Civil Code, to read:

2954.4. The maximum charge or penalty which may be imposed for late payment of an installment due on a loan secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling is 10 percent of the installment due. No charge or penalty may be imposed more than once for the same

late payment of an installment. A payment is a "late payment" for purposes of this section when not paid within six days following the due date of the installment.

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than options the landowner may not avail himself of this section when he has required the improvements to be made. In *Ott Hardware Co. v Yost* (1945) 69 CA2d 593, 159 P2d 663, the lessee was held to be the owner's agent in contracting with third parties for the improvements, and the landowner was denied the protection of CCP §1183.1. No reported California case can be found considering the applicability of *Ott* to an option. *American Transit Mix Co. v Weber* (1951) 106 CA2d 74, 234 P2d 732, however, held that the ruling in *Ott* was not applicable to a land sales contract and that the seller could avail himself of the protection of CCP §1183.1.

On the need for reasonableness in approval, see §6.10.

C. Complete Agreements

1. [§4.67] C.R.E.A. Deposit Receipt*

In 1967, pursuant to an accord with the State Bar, the California Real Estate Association copyrighted and published a new purchase contract to supplant its old deposit receipt. Circled numbers superimposed on the example shown here indicate corresponding parts of the discussion below. The accord emphasizes the materiality of the manner in which the form is printed, including the size of type and placements of caveats and signatures on the document. The example here is identical in layout with the new one-page form, but some blank spaces have been deleted and the whole form has been reduced slightly to fit the pages of this book.

The accord further states the purpose and desire of the two organizations that the new form shall be used in all real estate transactions in California to which it is adapted and commits the C.R.E.A. to act in good faith to accomplish this purpose. For further details of the accord, see 42 CAL SBJ 487 (1967). For other provisions that may be appropriate for the particular transaction, see Appendix (outline agreements); §6.4 (checklist). On the manner of affixing addenda, see §5.40.

CALIFORNIA REAL ESTATE ASSOCIATION STANDARD FORM

(1) Real Estate Purchase Contract and Receipt for Deposit

(2) THIS IS MORE THAN A RECEIPT FOR MONEY. IT MAY BE A LEGALLY BINDING CONTRACT. READ IT CAREFULLY.

_____, California, _____, 19____

Received from (3) _____

_____ herein called Buyer,

the sum of _____ Dollars ($_____)

evidenced by cash ☐, personal check ☐, cashier's check ☐, or (4) _____

as deposit on account of purchase price of _____ Dollars ($_____)

for the purchase of property, situated in _____, County of _____, California, described as follows:

(5) _____

Buyer will deposit in escrow with (6) _____

the balance of purchase price as follows: (7) _____

1. Title is to be free of liens, encumbrances, easements, restrictions, rights and conditions of record or known to Seller, other than the following: (8) _____

Seller shall furnish to Buyer at (9) _____ expense a standard California Land Title Association policy insuring title in Buyer subject only to liens, encumbrances, easements, restrictions, rights and conditions of record as set forth above. If Seller fails to deliver title as herein provided, Buyer at his option may terminate this agreement and any deposit shall thereupon be returned to him. (10)

2. Property taxes, premiums on insurance acceptable to Buyer, rents, interest, and (11) _____ (Insert in blank any other items of income or expense to be prorated) shall be prorated as of (1) the date of recordation of deed or (2) (12) _____ (Strike (1) if (2) is used). The amount of any bond or assessment which is a lien shall be paid assumed (Strike one) by (13) _____. Seller shall pay cost of revenue stamps on deed.

3. Possession shall be delivered to Buyer (Strike inapplicable alternatives) (a) on close of escrow, or (b) not later than _____ days after closing escrow, or (c) (14) _____

4. Escrow instructions signed by Buyer and Seller shall be delivered to the escrow holder within (15) _____ days from the Seller's acceptance hereof and shall provide for closing within _____ days from the opening of escrow, subject to written extensions signed by Buyer and Seller.

5. Unless otherwise designated in the escrow instructions of Buyer, title shall vest as follows: (16) _____

(17) (THE MANNER OF TAKING TITLE MAY HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES. THEREFORE, GIVE THIS MATTER SERIOUS CONSIDERATION.)

6. If the improvements on the property are destroyed or materially damaged prior to close of escrow, then, on demand by Buyer, any deposit made by Buyer shall be returned to him and this contract thereupon shall terminate. (18)

(19) 7. If Buyer fails to complete said purchase as herein provided by reason of any default of Buyer, Seller shall be released from his obligation to sell the property to Buyer and may proceed against Buyer upon any claim or remedy which he may have in law or equity; provided, however, that by placing their initials here ((20) Buyer) (Seller), Buyer and Seller agree that it would be impractical or extremely difficult to fix actual damages in case of Buyer's default, that the amount of the deposit is a reasonable estimate of the damages, and that Seller retain the deposit as his sole right to damages.

(21) 8. Buyer's signature hereon constitutes an offer to Seller to purchase the real estate described above. Unless acceptance hereof is signed by Seller and the signed copy delivered to Buyer, either in person or by mail to the address shown below, within _____ days hereof, this offer shall be deemed revoked and the deposit shall be returned to Buyer.

9. Other terms and conditions: (Set forth any terms and conditions of a factual nature applicable to this sale, such as financing, prior sale of other property, the matter of structural pest control inspection, repairs and personal property to be included in sale.) (22) _____

10. Time is of the essence of this contract. (23)

Real Estate Broker (24) _____ By _____

Address _____ Telephone _____

The undersigned Buyer offers and agrees to buy the above described property on the terms and conditions above stated and acknowledges receipt of a copy hereof.

Dated: _____ _____

Address _____ _____

Telephone _____ Buyer (3) _____

ACCEPTANCE

The undersigned Seller accepts the foregoing offer and agrees to sell the property described thereon on the terms and conditions therein set forth.

The undersigned Seller has employed the Broker above named and for Broker's services agrees to pay Broker, as a commission, the sum of (25) _____ _____ Dollars ($_____) payable as follows: (a) On recordation of the deed or other evidence of title, or (b) if completion of sale is prevented by default of Seller, upon Seller's default, or (c) if completion of sale is prevented by default of Buyer, only if and when Seller collects the damages from Buyer, by suit or otherwise, and then in an amount not to exceed one half that portion of the damages collected after first deducting title and escrow expenses and the expenses of collection, if any.

The undersigned acknowledges receipt of a copy hereof and authorizes Broker to deliver a signed copy of it to Buyer.

Dated: _____ _____

Address _____ _____

Telephone _____ Seller (26) _____

Broker consents to the foregoing.

Dated: _____ Broker (24) _____

(2) A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE CONSULT YOUR ATTORNEY.

THIS STANDARDIZED DOCUMENT FOR USE IN SIMPLE TRANSACTIONS HAS BEEN APPROVED BY THE CALIFORNIA REAL ESTATE ASSOCIATION AND THE STATE BAR OF CALIFORNIA IN FORM ONLY. NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OF ANY PROVISION OR THE ADEQUACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. IT SHOULD NOT BE USED IN COMPLEX TRANSACTIONS OR WITH EXTENSIVE RIDERS OR ADDITIONS.

1. The new title supplants the former "Deposit Receipt."

2. The caveats directly following the title and at the end are two of three in the new form. See also item 17 below.

3. On buyer's identity, see §§4.18–4.20.

4. On the use of personal checks, see §14.23. On a requirement for placing the deposit in escrow, see §5.28.

5. On description of property, see chap 8.

6. Balance in escrow. The old deposit receipt required the balance of the purchase price to be placed in escrow within a fixed number of days from seller's acceptance. That requirement is now omitted, though it is implied from the closing date. See item 15 below. Compare form, §§9.9–9.11.

7. On stating the price and financing provisions, see chap 9.

8. Condition of title. Matters to which title is to be subject are now broadened beyond the "liens and encumbrances" to which former Article 2 was limited but are narrowed to those "of record or known to seller." This is more limited than the "marketable title" (see §6.20) promised by former Article 2 and makes important to the buyer the protection of a preliminary title report (see §3.13) or conditions for approval of title matters (see §§6.23–6.24) or both. In practice, however, sellers often protected themselves under the former provision by requiring the buyer to pay for extended title insurance coverage or a survey to reveal off record defects. On the buyer's remedies for seller's breach (even without the express requirement of former Article 3 that seller pay any expense of removing title defects), see §§11.3–11.26. On constructive notice resulting from the record or the duty to inspect, see §§18.4–18.13.

9. Title insurance. The seller is now required to furnish a standard CLTA policy, though the parties may still shift the expense. On differences between southern and northern California practices in placing the expense on buyer or seller, see §§14.8–14.9. For a comparison of standard coverage with other forms, see chap 17.

10. Seller's default. Under former Article 2, if seller was unable to convey marketable title as agreed, the buyer could demand the return of the deposit "and all other sums paid by buyer," and the agreement, as between buyer and seller, would be "of no further effect" except for seller's obligation to pay all expenses incurred in connection with examination of title. The new form, giving buyer the election to "terminate" and recover his deposit, does not clarify whether termination precludes the right to damages for breach. See also item 18 below. On buyer's remedies for seller's default generally, see §§11.3–11.26.

11. Prorations. Former Article 3 called for proration of "taxes, premiums on insurance acceptable to Buyer, rents, interest and other expenses of said property." On other matters to be prorated, see §§14.34–14.40.

12. On the proration date, see §14.35.

13. Assessment lien. Former Article 3 left open to negotiation the responsibility for paying any bond or assessment lien but required the seller to pay existing delinquencies. Many sellers resisted on the ground that even delinquent payments were for benefits to be enjoyed during the buyer's ownership. Now that question is open to negotiation, and the parties may choose either to pay or to assume. On the seller's obligation in the absence of agreement, see §§6.41–6.42.

14. Possession. For the effect of possession on risk of loss, see §§13.1–13.11.

15. Escrow. Provision for signed escrow instructions is new, and the times for opening and closing escrow are clearly stated. For comparable forms and comments, see §§14.7, 14.51. The form no longer contains the provision of former Article 6 giving the broker the right, without notice, to extend for up to 30 days the time for performing any act except seller's acceptance or the date of possession. This provision reduced the effectiveness of the "time of essence" clause. See §11.7.

16. Vesting provisions were formerly in a box at the end of the form. On the manner in which the buyer should take title, see §§4.24–4.26. On agents or nominees, see §§4.18–4.22.

17. This is the second of the three new caveats in this form. See also item 2 above.

18. Destruction or damage. Neither this provision nor former Article 2 protects seller against loss occurring during buyer's possession before title passes. See chap 13. The buyer is given the right to "terminate," which is also the word used in Article 1. See item 10 above.

19. Buyer's default. Under former Article 1, the expectations of both buyers and sellers often were frustrated. Sellers erroneously expected to be able to keep the deposit following buyer's breach; buyers expected to be able to walk away from the transaction by surrendering the deposit. See §11.49. On seller's actual remedies for buyer's breach, see §§11.48–11.67.

20. The parties may now elect a liquidated damages provision in the amount of the deposit. The requirements for a valid liquidated damages provision are discussed at §§11.50–11.51.

21. The manner of acceptance by seller is now more clearly described than in former Article 5.

22. Other terms and conditions. The new form actually suggests adding common conditions and personal property. For desirable conditions not suggested here, see §§6.23–6.88, 8.73.

23. Former Article 6 gave the broker a right to extend. See item 15 above.

24. On broker's execution, see §5.41. The broker signs twice on this form.

25. On broker's compensation, see §§5.33–5.37, 5.75–5.89. The seller is now protected against liability to the named broker for commission unless the sale closes or the seller either breaches or recovers for the buyer's breach. On the seller's liability for a commission in the absence of this provision, see §5.33.

26. On seller's identity, see §4.17.

2. Agreements Drafted From Forms in Book

a. [§4.68] Organization and Contents

The outline agreements in the Appendix cross-refer to forms in chapters 4–18 for the language of the provisions themselves. The division of these forms among various chapters facilitates intensive discussion of the problems they present, but gives no comprehensive view of their respective places in a single instrument. To point out the interrelations of clauses now separated and ways in which they fit into a particular agreement, the outline agreements show the sequence and organization of these forms as they might appear in a typical contract.

These outline agreements also illustrate that logical organization serves a useful purpose. Provisions relating to escrow, for example, are placed together, not only to facilitate understanding by the parties (and by the court, if there is litigation), but also to assure that all pertinent provisions will be included in the escrow instructions and observed by the escrow holder. Similarly, covenants to be incorporated in the deed appear in the agreement directly following the description so that they will not be omitted inadvertently when the deed is drafted; the provision against merger of the agreement into the deed follows the covenants to avoid their omission from the deed when it is drafted.

Some of the forms require adaptation for the particular type of agreement in which they are used. Thus, provisions concerning proration of taxes and other items that appear in the escrow instructions are the basis for similar provisions in the purchase and sale agreement. In escrow instructions they are instructions to the escrow holder; in the purchase and sale agreement, they must be adapted to an agreement between the buyer and the seller.

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

November 7, 1972

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, CA 94305

Re: Liquidated damages

Dear Mr. DeMoully:

Thank you for your letter of November 3. I regret that I will not be able to attend the Commission's meeting on the evening of November 9, but I have reviewed your materials on liquidated damages and I have the following comments on proposed C.C. §3321.

1. I suggest that the words "any part or all of" be inserted before the words "the deposit" in the third line of §3321(a). Particularly in contracts for the sale of residential real estate, the deposit made by the purchaser is rarely less than 5-10 percent of the total purchase price. The buyer is typically unwilling to forfeit such a large sum in the event of his default and I can see no policy reason why the parties should not be able to liquidate their damages at an amount less than the entire deposit. For the same reason, I suggest that references to a "deposit" in §3321(b) be changed to "the amount specified by the parties as liquidated damages."

2. Again, in the interests of greater flexibility in the bargaining between the parties, I would not restrict the applicability of §3321 to funds deposited by the purchaser "at or before the time he executes the contract." Quite often the purchaser's obligations are subject to various conditions and his initial deposit may be quite small, with the amount to be increased by deposit of a further sum in escrow after the conditions have been satisfied. Why should the seller not be able to include part or all of such additional deposits as his liquidated damages?

3. Proposed §3321 makes no reference to the availability of liquidated damages to the buyer. The buyer's problems in recovering damages for breach of a contract to sell real estate are as great, if not greater, than the sellers. See California Real Estate Sales Transactions (CEB 1967), chapter 11. I would think that the

buyer could recover liquidated damages by reason of the provisions of proposed §3319, but the Commission's comment to §3319 states that that section does not "affect the statutes that govern liquidation of damages for breach of certain types of contracts." This comment suggests that if the contract is for sale of real estate, liquidated damages are available only to the seller, by reason of the provisions of §3321. Perhaps the difficulty here lies not in the language of the proposed statute but in the ambiguity of the comment to §3319.

In general, I think that the Commission's proposed legislation is well thought out and drafted and would represent a great improvement over the present unsatisfactory state of the law in this area.

Yours truly,

David A. Leipziger

David A. Leipziger
Acting Professor of Law

DAL:bd

California Savings and Loan League

P.O. BOX R (1444 WENTWORTH AVENUE), PASADENA, CALIFORNIA 91109 • TELEPHONE: (213) 684-1010

November 7, 1972

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear John:

We appreciate your forwarding the background material and the tentative recommendation of staff relative to liquidated damages and late charges. Unfortunately, there is not adequate time to prepare and present to the Commission at its meeting on November 9 our full views regarding the proper posture and amounts of late charges for our lending operations in relation to your broader subject under consideration of liquidated damages. We are, therefore, simply enclosing for the record a statement of our position in opposition to the tentative recommendation of staff.

Yours sincerely,

W. Dean Cannon, Jr.
Senior Vice-President

WDC:sp
Enc.

California Savings and Loan League

P.O. BOX R (1444 WENTWORTH AVENUE), PASADENA, CALIFORNIA 91109 • TELEPHONE: (213) 684-1010

November 7, 1972

California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Gentlemen:

The California Savings and Loan League has just become aware of the tentative recommendation proposed by the staff of your Commission relating to late charge limitations on loans secured by real property. These proposed limitations are totally inadequate to properly compensate lenders for the servicing required in connection with this type of loan activity. We, therefore, are strongly opposed to the recommendation.

Unfortunately, there has not been sufficient time for League counsel to review all of the background material submitted to the Commission and from which we assume staff personnel arrived at the recommended approach. If the Commission believes it would be helpful to have arguments in support of our views--both legal and otherwise--at some future date, we would be more than happy to provide the Commission with this information.

Yours sincerely,

W. Dean Cannon, Jr.

W. Dean Cannon, Jr.
Senior Vice-President

WDC:sp

ROBERT W. KARPE, Commissioner
RONALD REAGAN, Governor
STATE OF CALIFORNIA
DEPARTMENT OF REAL ESTATE
714 P Street
Sacramento, CA. 95814

November 6, 1972

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMoully:

Thank you very much for sending me the background material assembled by the staff of the Law Revision Commission on the related subjects of liquidated damages and late charges. As the public agency responsible for administration of the Mortgage Loan Brokers Act, we have a particular interest in the proposal to add § 10242.5 to the Business and Professions Code.

The Department has long believedthat there is a need for a limitation on late charges for delinquent loan repayments under the Mortgage Loan Brokers Act. We have consistently supported legislation to this end if the limitation appeared to be a reasonable one, both from the standpoint of the borrower and from that of the broker servicing the loan for the lender. Our preference is for a limitation through amendment of the Civil Code such as that embodied in Assembly Bill No. 1516 as equitable treatment of all real property loans would seem to dictate an across-the-board limitation. We recognize that there is an apparent basis for differentiating between the imposition of late charges in two-party loans as distinguished from three-party loans. Theoretically, in two-party loans, damages incurred through delinquent payments are made up of the loss of the funds for the period of the delinquency and the costs incurred in collecting the late payments while in a three-party loan, the servicing agent incurs damages only through the added cost of the collection process. Among many mortgage loan brokers, however, the practice is to forward periodic installments to the lender whether or not the payment has been received from the borrower. Thus the broker in effect incurs the same "damages" as does the lender in a two-party loan.

This information is simply food for thought by the Commission in its determination of what is a reasonable late charge

limitation under the proposed § 10242.5. Industry I am sure will supply you with a great deal more in the way of statistical data on the actual costs incurred on account of delinquent payments. This letter is prompted in part by the statement at page 2 of the First Supplement to Memorandum 72-71 to the effect that the need for a reduction in the late charge limitation from 10% to 4% is demonstrated by an article of October 24, 1972 in The Los Angeles Daily Journal. In fairness to all, I think that it should be pointed out that there is no reliable data that we are aware of to support several of the statements attributed to Mr. Cabell. I am quoted to the effect that late charges on loans negotiated under the Mortgage Loan Brokers Act are less of a problem than they used to be. This is essentially correct. § 2954.5 which was added to the Civil Code by the 1970 Legislature and the growing trend toward consumerism have done much to ameliorate the abuses in assessing late charge that existed a few years ago.

If the Department of Real Estate can be of any assistance to the Law Revision Commission in furnishing additional information in areas of their consideration which involve matters within the knowledge of this Department, please feel free to call me.

Sincerely,

W. Jerome Thomas
Chief Legal Officer

WJT/pk