

Recent Cases Involving Mortgage Loan Prepayment

Patrick A. Randolph, Jr.
Elmer Pierson Professor of Law
UMKC School of Law

Of Counsel: Blackwell Sanders Peper Martin
Kansas City, Missouri

ABA CLE Conference - Spring, 2007

The reports below (in fact, vastly extended reports) appeared originally on DIRT, the internet discussion group for real estate attorneys. DIRT is available with full discussion, in regular or daily digest format, or, if you are a member of the ABA Section on RPPT, as DIRTLite, which sends only a single message each day - the Daily Development. Contact me at prandolph@umkc.edu to subscribe.

All of these cases, and hundreds more, also appear in the hard copy publication: ABA Quarterly Report on Current Developments in Real Estate Law. Subscription arrangements for the Quarterly Report are remarkable reasonable. Section members may subscribe to this report (\$30 for two years). Contact Shanel Taylor at (312) 988-5651, taylor2@staff.abanet.org. ABA members also can access prior and current editions of this report on the [aba rppt section website](http://aba.rppt.org).

1. Eighth Circuit finds that yield maintenance provision predicated on treasury yields is acceptable as a liquidated damages approach to compute prepayment penalty following default and acceleration. The court holds specifically that the clause is reasonable even under the Bankruptcy Code 506b test for reasonable fees and charges. *In re CP Holdings (CP Holdings v. Calif. Public Employees Retirement System, 2006 U.S. App. LEXIS 27676 (8th Cir. 11/7/06)*
- 2.. Federal judge concludes that standard yield maintenance clause using treasury rate as discount is invalid as a penalty in Illinois. *River East Plaza, LLC v. The Variable Annuity Life Company, 2006 WL 278243 (N.D. Ill. 9/22/06)*
3. Lenders may not collect “early closure fee” in consumer refinancing when loan agreement prohibits prepayment penalties - a ringing opinion condemning major lender consumer mortgage practices. *Bonior v. Citibank, N.A., 2006 N.Y. Misc. LEXIS 3862, 236 N.Y.L.J. 117 (Dec. 7, 2006)*,

4. Federal District Court concludes that "sliding percentage scale" prepayment provision should be disallowed because, under liquidated-damage analysis, lender failed to establish that penalties were "reasonable" charges under sec. 506(b) of Bankruptcy Code. ***UPS Capital Business Credit v. Gencarelli, 2006 WL 3198944 (U.S D.C. RI Nov. 3, 2006),***
5. A "lock-out" clause that prohibits prepayment without the lender's consent, may not be enforceable because lender is subject to "duty of reasonableness." ***Littlejohn v. Parrish, 839 N.E.2d 49 (Ohio Ct.App. 2005)***
5. Express bargained-for provision in promissory note that acceleration of the debt constitutes an involuntary prepayment requiring payment of the prepayment premium, is enforceable. ***Feinstein v. New Bethel Missionary Baptist, 2006 Fla. App. LEXIS 14624, Sept. 1, 2006***
6. A payment of a loan balance following default and acceleration is not a "prepayment," and therefore a prepayment premium clause characterizing the payment due following acceleration as a "prepayment" and not a "repayment" is not enforceable. Case involves characterization of prepayment following default as possible "evasion" of prepayment charges, and thus clause applies only to defaults made for purposes of such evasion. ***The Northwestern Mutual Life Insurance Company v. Uniondale Realty Associates, 11 Misc.3d 980, 816 N.Y.S.2d 831 (N.Y.App. 2006)***
8. Provision that states that long term debt secured by a real estate interest may be paid "on or before" due date is an agreement to permit prepayment without penalty. ***Engler v. Senter, 2006 Westlaw 1476945 (Mo. App. 5/23/06)***
9. A creditor fails to show that its requested prepayment premium is reasonable when the two methods that are provided in the promissory notes require complex calculations and respondent offers no further evidence that the prepayment premium charged under either method is reasonable. ***In re Holmes, 330 B.R. 317 (Bankr.M.D.Ga., July 1, 2005).***
10. A borrower who knowingly triggers a loan default in order to achieve other financing goals has "voluntarily" caused a prepayment when the lender accelerates in response, and the analysis of whether the prepayment premium is legitimate should focus only on whether the premium is "reasonable," and not whether it meets liquidated damages standards. ***Clean Harbors, Inc. v. John Hancock Life Ins. Co., 833 N.E.2d 611 (Mass. App. Ct. 2005).***