

Illinois Appellate Court Upholds Prepayment Ruling Against Lender

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Introduction

On November 26, 2002, the Illinois Appellate Court (First Judicial District) issued its much-anticipated ruling in *LaSalle National Bank v. Metropolitan Life Insurance Co.*, Nos. 1-00-4074 and 1-01-1255 (consolidated). In a 23-page Order, the appellate court upheld the Cook County Circuit's Court ruling (issued on October 30, 2000; see *LaSalle Nat'l Bank v. Metropolitan Life Ins. Co.*, 2000 WL 1887531), which awarded Merchandise Mart Owners, L.L.C. ("Mart Owners") the entire disputed mortgage prepayment fee of \$53 million deposited in escrow with the circuit court at the time of the sale of the mortgaged property. This amount constituted the prepayment fee as calculated by the lender, Metropolitan Life Insurance Company ("MetLife"), and the interest accrued thereon until the date of the circuit court's ruling. MetLife claimed that it was entitled to this amount as the result of the payment of the existing mortgage from MetLife to Mart Owners in connection with Mart Owners' sale of the mortgaged Chicago commercial property, the Merchandise Mart ("Mart"), to Vornado Real Estate Investment Trust ("Vornado") for \$625 million in 1998 (prior to the end of the loan term).

Background

The Mart is a unique, 3.7 million-square-foot structure in downtown Chicago that provides space for the showroom industry, including contract furnishings, home furnishings, floor covering and giftware, as well as casual furniture. It also has some office and retail tenants. Kennedy family patriarch Joseph P. Kennedy bought the Mart in 1945, for \$13 million. The plaintiff in this case, LaSalle National Bank, was the holder of legal title to the property, not personally but solely as trustee under an Illinois land trust. Mart Owners, each members of the extended family of the late Joseph P. Kennedy, were the sole beneficiaries of the LaSalle land trust.

The dispute arose out of the prepayment provision in MetLife's 1987 20-year nonrecourse loan to Mart Owners in the amount of \$250 million, which was secured by a first mortgage on the Mart. The prepayment clause in the mortgage was highly unusual -- and heavily negotiated. The provision contained "lockout" language that prevented any prepayment during the first 10 years of the loan. The mortgage could be prepaid during the last 10 years but a "prepayment fee"

would be due and payable by the mortgagor equal to the excess, if any, that would be required (over and above the outstanding principal balance) "to purchase, on the date of prepayment, a security instrument selected in good faith" by MetLife that, in the "good faith judgment" of MetLife, was of "comparable investment quality" to the original 1987 loan as of the date the loan was made. Apparently the parties settled on this unusual language because they could not reach agreement, during loan negotiations, on a more exact benchmark.

In early 1997, Mart Owners wished to sell the Mart and approached MetLife to discuss a possible revision of the terms of the prepayment premium. Mart Owners also requested an estimate of the prepayment fee that would be due if Mart Owners sold the property. MetLife (after a great deal of internal analysis) informed Mart Owners in late 1997 of its preliminary decision that the mortgage, at the time it was made, was comparable in investment quality to an "A" rated corporate bond, and that the prepayment penalty would be \$30 million based on current corporate bond rates. On January 23, 1998, Mart Owners agreed to sell the Mart to Vornado, and MetLife then recalculated the prepayment fee at \$45 million, based on the subsequent decrease in the yield for A-rated corporate bonds.

Shortly before April 1, 1998, the scheduled closing date for the sale of the Mart to Vornado, Mart Owners filed a two-count complaint for declaratory judgment, seeking a release of the mortgage upon its deposit of the estimated prepayment premium into escrow, as well as a determination that MetLife had "materially breached the prepayment provision in the mortgage loan documents and was not entitled to any prepayment premium."

The Circuit Court's Decision

On March 20, 1998, the circuit court directed Mart Owners to place the amount of the disputed escrow fee in escrow on April 1, 1998. The sale of the Mart to Vornado was closed on April 1, 1998 (April Fool's Day – perhaps not a good omen for MetLife), and MetLife released its mortgage (but not the underlying note) upon the deposit of the estimated prepayment fee of \$47.4 million into escrow. MetLife subsequently filed a three-part counterclaim, requesting (1) a release of the escrow account, (2) a declaration that the Mart Owners were in default of the mortgage loan because of their failure to pay the prepayment fee, and (3) that if it was successful on the foregoing claims, the imposition of an equitable lien or constructive trust on the proceeds.

The circuit court's ruling, which came after a three-month bench trial that generated more than 5700 pages of testimony, focused solely on the following issues: (1) MetLife's "good faith" in determining the "investment quality of the Note on the date hereof" (i.e., April 16, 1987); (2) MetLife's "good faith" in selecting a "security instrument" as the basis for the imposition of a prepayment

fee, if any (which instrument must be available for "purchase" my MetLife); and (3) MetLife's "good faith" assessment of whether the security instrument it selected was of "comparable" investment quality to that of the 1987 loan.

According to the circuit court, "Because high quality security instruments typically carry low yields, a determination that the 1987 Loan was of high quality would enable MetLife to claim a substantial prepayment penalty because of the gap between the Note's interest rate of 9.75% and the lower rate payable on a high quality substitute security instrument." Not surprisingly, MetLife argued that the mortgage, at the time it was made, was comparable in investment quality to an A-rated corporate bond. At the trial, MetLife's attorneys produced, in support of MetLife's use of A-rated corporate bonds as the applicable benchmark, the original loan proposal submitted by Mart Owners, which referred to the Mart as the "pre-eminent market center building in the world" and which praised the internal design and construction of the Mart as "superior" and as having a projected life far greater than most buildings. The proposal also described the then-current management, operation and maintenance of the Mart as exceeding the qualitative and quantitative scope of services usually provided to commercial real estate projects. MetLife also noted that Mart Owners, in their own internal evaluations, valued the Mart at approximately \$400 million.

On the other hand, Mart Owners argued (also unsurprisingly) that the loan was on a substandard property that, at the time it was made, did not generate sufficient income to cover the required debt service and necessitated a \$60 million escrowed holdback of the loan proceeds by MetLife, to be distributed only upon the achievement of a 1:2 debt-service-coverage ratio and the performance of \$30 million of rehabilitation work. (Mart Owners estimated that the total cost of necessary renovations would be \$100 million). Mart Owners further argued that the building was losing office, retail and showroom tenants and that the real estate market at the time was severely depressed. Mart Owners produced a 1998 statement by a MetLife executive, which stated that the Mart was a "barn of a building" that had "little or no use in the 21st Century." Mart Owners argued that as a result of the foregoing, the benchmark for determining the prepayment fee should be the lowest-rated bonds (in effect, "junk bonds"), which carried a rate higher than the 9.75% mortgage rate; therefore, according to Mart Owners, no prepayment fee was due at the time of the sale to Vornado.

The circuit court cited Illinois case law for the proposition that the duty of good faith prevented a party from making an "arbitrary determination." The court stressed that MetLife was required to determine the investment quality of a comparable instrument "on the date it closed," and that this "determination should have been based upon what MetLife then knew or discovered through inquiry to be the investment quality of the 1987 loan."

In the circuit court's opinion, MetLife acted arbitrarily and unreasonably where, as occurred in this case, "MetLife knew it had as security an aging

property that was in need of over \$100 million in rehabilitation and serious construction (40% of the \$250 million loan); where the current cash flow on a non-recourse loan was below the level needed to meet the debt service; where the 'truth-in-lending' effective rate of the loan was raised from 9.75% to 12.82% by the failure to fund \$60 million at the closing and only funding \$190 million with the payments due on the full face amount of the \$250 million loan; and where the 'value' of the property was based on post construction rent-up assumptions by the loan underwriters at MetLife that were not true as of the date of closing. As of April 16, 1987, this was a high-risk hybrid construction/end loan that could not be found to be 'investment grade' by any objective standards."

According to the circuit court, MetLife had breached the contract by "failing to base its prepayment penalty demand on the investment quality of the 1987 loan 'on the date hereof,'" i.e., it had based its analysis on projections that assumed a fully rehabilitated and retenanted property. The court found that "the failure to perform express contractual duties is a breach, regardless of whether the party acts in good faith. (citation omitted)"

The circuit court also found that MetLife materially breached the contract by selecting an index instead of an actual "security instrument" that was available for "purchase," and further breached the contract by failing to act in good faith in assessing whether the security instrument to be selected was of "comparable" investment quality to the original note. Therefore, the circuit court held, "MetLife's conduct, in adopting an approach doomed to failure and in rejecting available alternative investments, failed all three of the alternative standards of good faith. That breach by MetLife was material." The circuit court also ruled that MetLife was not entitled to recovery under equitable principles because it "did not suffer any injury in connection with prepayment" because of the higher rates available on alternative instruments at the time of prepayment.

The circuit court determined that "a proper objective approach to this problem would have been to assign a value to all of the issues raised and equate those issues to corporate bonds." The court then set forth, in a chart, the "value" that it assigned to each of the factors that it believed, as the result of the evidence at trial, were relevant as to the value of the property at the time of the loan, i.e., the 67.6% loan-to-value ratio; the strength of the borrower and management; the construction-cost component of the loan; the .94 debt-service-coverage ratio; and the "effective" 12.82% interest rate as the result of the escrowed and held-back proceeds. The chart created by the court correlated each of these value factors to a rating based on bond ratings from AAA (the highest) to C (the lowest). According to the court, the "average" rating of the 1987 MetLife loan at the time it was made was 5.2, which correlated to a B+ bond rating under the chart. The court stated that therefore the loan should be the equivalent of this rating, "assuming that all of these issues are of equal weight in the valuation of the loan. The evidence points to that conclusion."

The circuit court stated that it was entitled to make alternative findings when the "interest of judicial economy and expediency dictate." Based on this rationale, the court then held that even if the prepayment clause was ambiguous, the provision had the meaning understood by Mart Owners and not the meaning argued by MetLife, because "MetLife knew or had reason to know that Mart Owners attached that meaning to the provision, and Mart Owners did not know or have reason to know that MetLife attached a different meaning to the provision." The court stated that, "MetLife failed all three of the alternative standards for good faith with regard to determining the investment quality of the Note, including the requirement that MetLife not act 'in a manner inconsistent with the reasonable expectations of the parties.'" The court further found that "Mart Owners did not reasonably expect that MetLife would select an index of unspecified bonds rather than bonds with a definite 'security instrument' as the alternate security."

Based on the foregoing reasoning, the circuit court ordered that all escrowed funds, with interest thereon, be returned to Mart Owners. Judge Reid required MetLife to post a \$20 million bond appeal bond. MetLife's post-judgment motion for a partial prepayment fee was denied on March 22, 2001. MetLife then appealed the circuit court's decision, challenging the court's 1998 order directing Mart Owners to escrow the estimated prepayment fee amount; the court's October 30, 2000, judgment in favor of Mart Owners; and the court's denial of MetLife's post-judgment motion.

The Appellate Court's Decision

According to the appellate court, "[t]he Loan contained a prepayment premium which was unique to MetLife and the product of extensive negotiations between the parties." (The appellate court apparently agreed with Judge Reid, who stated in his circuit court opinion that, "The language of the prepayment penalty provision at issue in this case is unique. The evidence at trial failed to reveal any other loan with a prepayment penalty provision similar to the one at issue in this case"). The appellate court also found that the testimony showed that the individuals who analyzed this provision internally at MetLife were aware of these facts, as well as the requirement that "the comparable instrument selected had to be available for purchase on the date of prepayment but did not actually have to be purchased."

The appellate court concurred with the circuit court's finding that "the prepayment provision was clear and unambiguous," and rejected MetLife's claim that the circuit court had unfairly shifted the burden of proof on to MetLife to demonstrate its compliance with the prepayment provision instead of requiring Mart Owners to prove that MetLife had breached the provision.

Making reference to the three separate factors that the circuit court found were determinative as to whether MetLife had breached the prepayment

provision (see the discussion of the circuit court's opinion, *supra*), the appellate court found that it was "necessary to address only one of the court's findings, specifically its conclusion that MetLife materially breached the loan agreement by failing to select a comparable security instrument that was available for 'purchase' by MetLife."

The appellate court found that the evidence presented at trial clearly established that instead of selecting an actual "security instrument" that was "available for purchase" by MetLife, it selected an index of A-rated corporate bonds that (as acknowledged by MetLife's own experts) was not available for purchase. According to the court, "MetLife's asserted good faith in the selection of the bond index does not alter the clear fact that MetLife did not comply with the express terms of the prepayment provision and, thus, cannot excuse its breach." The court further stated that it would "decline MetLife's invitation to take judicial notice of MetLife's purported ability to buy the index upon which it relied," and rejected MetLife's claim that Mart Partners had unfairly changed its position to MetLife's detriment during the course of the litigation. The court also concurred with the finding of the circuit court that MetLife's breach of the prepayment provision was material, noting that the provision was unique and had been heavily negotiated by the parties.

Turning to the issue of whether MetLife was entitled to a prepayment fee as a matter of equity, the appellate court (while noting that MetLife had not cited any authority in support of an "equitable prepayment penalty") ruled that MetLife had not suffered any harm because "[a]s the circuit court found, alternative security instruments yielding at the same or greater rate as the loan's note were available for purchase by MetLife at the time of prepayment." The court noted that at the trial the circuit court had determined that the testimony of Mart Owners' expert was more credible regarding the availability of specific commercial backed mortgage securities, and refused to "second guess" the trial court or hold that its finding in this regard constituted reversible error.

The appellate court next rejected MetLife's claim that it had been erroneously deprived of its right to a jury trial (finding that MetLife had never indicated that it wanted the issues tried by a jury). Finally, the court also rejected MetLife's claim that the circuit court erred in denying its post-trial motion seeking to reopen the proofs so that it could offer evidence (not submitted at the trial) that would support a "middle ground" of approximately \$20 million. MetLife sought to introduce new evidence concerning the yields on corporate bonds rated below the A-rated bonds that MetLife had selected as comparable security instruments. MetLife argued that although the circuit court had held that MetLife did not select the comparable instrument in good faith it should be allowed to prove its "actual damages" and not forfeit all rights to a prepayment fee, which would result in the Mart Owners being unjustly enriched. However, the appellate court agreed with the reasoning of Judge Arnold (who succeeded Judge Reid as circuit court judge and heard MetLife's motion on this matter), who "concluded that MetLife's failure

to offer evidence of a ‘middle ground’ prepayment penalty at trial was the result of MetLife’s own deliberate ‘all or nothing’ trial strategy.” The appellate court refused to rule that the circuit court abused its discretion in denying MetLife’s motion on this issue, and stated that “there is no indication from the record that the proofs MetLife sought to introduce were not available at the time of trial.” The court further found that even if MetLife had been able to introduce such evidence, it “would not have changed the court’s judgment since the evidence would not have gone to the salient issues of MetLife’s breach or MetLife’s entitlement to equitable relief.”

(Note: The appellate court’s Order is not officially reported and contains a statement that “[t]he text of the Order may be changed or corrected prior to the time for a Petition for Rehearing or the disposition of the same.” As of the date of this article, it is uncertain whether MetLife will seek to file a Petition for Rehearing with the appellate court or appeal the decision to the Illinois Supreme Court).

Discussion

1. The appellate court places great emphasis, throughout its opinion, on its reluctance to disturb the specific findings of the circuit court with respect to the issues raised by the parties. The appellate court states that, “[t]he trial judge, as the trier of fact, is in a position superior to that of this court to observe the witnesses, to judge their credibility, and to determine the overall weight of evidence,” and that “[t]he evidence supports the circuit court’s conclusion and we are in no position to substitute our judgment for that of the trial judge even if we were inclined to rule differently.” It almost appears that the appellate court does not wish to “re-try” this case, and is more than willing (because of the unusual facts) to “let sleeping dogs lie.”
2. The *MetLife* case is catastrophic for MetLife because of the “all or nothing” nature of the appellate court’s opinion; i.e., MetLife is precluded from collecting any portion of the \$45 million prepayment fee calculated by MetLife. In its Motion to Modify Judgment that was filed with the circuit court after the court rendered its adverse judgment against MetLife, MetLife argued that Judge Reid, while assigning a B+ rating to the relevant corporate bonds based on his use of a chart he created that assigned ratings and values to a collection of relevant “issues,” failed to take the next necessary step of actually determining a fee based on such bonds. MetLife also asserted that in its trial brief, it had argued in the alternative that if the court found that MetLife did not select the instrument in good faith, MetLife should not forfeit all rights to a fee – which would unjustly enrich Mart Partners. MetLife asked the court to take judicial notice of the yields of four B+ rated bonds as of March 24, 1998. However, the appellate court (as well as the circuit court) resoundingly rejected this request, notwithstanding MetLife’s argument that the reason that it failed to introduce such evidence at the trial was because it could not have

anticipated that the comparable instrument, as determined by the circuit court, was not one mentioned or put into evidence by either party.

3. The (relatively) good news for mortgage lenders: This is not really a "prepayment" decision at all, and should have no general negative effect on the validity and enforceability of standard yield-maintenance mortgage provisions. As mentioned above, Judge Reid stated in the circuit court opinion that "The evidence at trial failed to reveal any other loan with a prepayment penalty provision similar to the one at issue in this case." True to his word, not one prepayment decision is cited in the circuit court opinion (or, for that matter, in the appellate court opinion).
4. The moral of the appellate court's (and the circuit court's) opinion in *Merchandise Mart*: stick with objective criteria for determination of the comparable prepayment security instrument and interest rate and never, *ever* draft a prepayment clause that provides for a subjective "good faith" determination of a security instrument of "comparable investment quality" as of the original date of the note (at least in Cook County, Illinois). There is a great risk in being a "pioneer" and deviating from standard industry practice in favor of a subjective determination; for a lender to do so is to act at its peril. An institutional lender is just asking for a court - at least in Illinois - to rewrite its mortgage and second-guess its decisions in order to reach an "equitable" result. When it comes to the drafting of prepayment provisions in mortgage-loan documents, it may be wise to "think inside the box."
5. It is interesting that in the body of the circuit court's opinion, the court goes to great lengths to describe the considered, laborious process that MetLife went through to arrive at the "A" bond reference rate - and then, in the last 17 pages of the opinion, the court abruptly proceeds to substitute its own version of a "good faith" analysis by creating a chart "assign[ing] a value to all of the issues raised and equat[ing] those values to corporate bonds." However -- as the circuit court readily admitted -- none of these factors is weighted: each is treated as being of equal importance. Talk about hindsight! It is highly unlikely that any sophisticated lender would treat each of the factors described by the court as being of equal weight.
6. Interestingly, it is clear from the testimony and court documents, and the language in the body of the circuit court's opinion, that Mart Owners always expected to pay a prepayment premium of some undetermined amount. Mart Owners had even hired a consultant who would be entitled to two percent of any reduction he could achieve in the amount of the prepayment premium to be paid by Mart Owners. When MetLife first advised this consultant, in April 1997, that it had preliminarily selected "A" to "BBB" bonds as the comparable investment, the consultant did not object or complain. As the circuit court stated in its opinion, "At no time prior to January 1998 did Mart Owners or its representatives object to the fee as described by MetLife or claim that no fee

was due, or demand an explanation as to how the comparable instrument was selected." In connection with the sale of the Mart in 1998 to Vornado, Vornado had agreed to pay 50% of any prepayment fee incurred by Mart Owners up to \$10 million. In addition, Mart Owners could direct the payment of their share of the prepayment fee out of the \$181 million cash component of the sale transaction.

7. The prepayment clause that was the subject of the *Merchandise Mart* case was a yield-maintenance provision and not a "defeasance" clause. Each of the parties to the lawsuit, throughout their pleadings, continuously referred to the provision as a yield-maintenance clause (the clause itself called for a "prepayment fee," not a substitution of collateral), and not a defeasance provision. The circuit court also clearly and consistently characterized the clause as a yield-maintenance provision in its opinion. This was, in effect, a standard yield-maintenance provision, with the only "twist" being that instead of, for example, using t-bills with the same maturity as the remaining term of the loan as the point of reference (and the discount rate) for determining the premium or adding, say, 100 basis points to the t-bill rate for computation of the premium, the parties agreed (regretfully, from MetLife' perspective) to leave the determination of the reference instrument to the "good faith" judgment of the lender.

Mart Owners' only concern, as evidenced by testimony and as stated by the circuit court in its opinion, was that "the prepayment should not be measured by Treasuries but instead should be measured by an instrument of comparable or similar investment quality to the mortgage . . . Mart Owners' concept was to put Metropolitan in its original position after a prepayment . . . MetLife would receive a yield maintenance payment only if yields on investments comparable to the 1987 Mortgage had dropped." For years, institutional lenders such as insurance companies have used "yield maintenance" clauses to calculate prepayment premiums. The clause is a method of (theoretically) compensating lenders in the event of prepayment during a declining interest-rate environment. This is especially so where lenders guaranteed yields to investors on investment contracts. "Guaranteed Investment Contracts," or GICs, were extremely common in the 1980s, and although not nearly as common today, still exist, and lenders attempted to employ "matched funding" concepts in the calculation of mortgage prepayment premiums. As stated by Richard F. Casher, in his article entitled *Prepayment Premiums: Hidden Lake is a Gem*, which appears in the November 2000 issue of the *American Bankruptcy Institute Journal*, at page 32:

A yield-maintenance clause typically assumes that the prepayment premium and the prepaid principal will be invested in U.S. Treasury securities (Treasuries) that will mature at the same time as the prepaid loan and that the dollars so invested will return the same yield that the

insurance company would have realized had its loan not been prepaid. Treasuries are used as the reinvestment norm because there exists no standard commercial mortgage loan rate, given the uniqueness of each commercial loan and the inherent difficulty (if not impossibility) of identifying an identical or similar loan; in contrast, the market for treasuries is deep and highly liquid.

(Mr. Casher represented Aetna Life Insurance Company in *In re Hidden Lake Limited Partnership*, 247 B.R. 722 (Bankr. S.D. Ohio 2000), a bankruptcy case in which Aetna's yield-maintenance prepayment provision, included in its claim against the debtor-mortgagor, was held to be enforceable under Ohio law as a valid liquidated-damages provision)

On the other hand, as Professor George Lefcoe has so ably stated in his paper titled *Prepayment Disincentives in Securitized Commercial Loans*, which was published in the 1999 PLI seminar book titled *Commercial Real Estate Finance*, at pages 246-47:

Modeled after an arrangement used by corporations to remove bonds from their books, defeasance requires the borrower to purchase U.S. government obligations for the mortgagee's benefit precisely matching the interest and principal payments on the scheduled mortgage. The mortgagee accepts the Treasury obligations as substitute security, and releases its lien on the security property . . . Compared to yield maintenance clauses, defeasance only marginally disadvantages mortgagors prepaying when rates have fallen. Instead of paying a yield maintenance fee plus the balance due on the debt, they purchase government securities in an equivalent sum. When rates are significantly above their contract rates, borrowers who would have been entitled to prepay without charge under yield maintenance clauses, will be shopping for Treasuries, if defeasance-burdened. The defeasance borrower's only consolation is that if interest rates have risen enough to offset the spread between the borrower's interest rate and current Treasury yields, the borrower will be able to defease with Treasuries presently worth less than the loan balance. All defeasance-burdened borrowers are penalized by having to finance the spread between Treasury and mortgage rates.

There are few, if any, reported cases (either bankruptcy or non-bankruptcy) that have decided the enforceability of defeasance clauses in commercial loan documents. These clauses are now the "norm" in securitized mortgage transactions, including CMBS and REMIC financings, and surely there will be case law dealing with mortgage defeasance provisions in the not-too-distant future. As also noted by Professor Lefcoe, "they [defeasance clauses] are just as vulnerable [as yield-maintenance clauses] since defeasance calls for prepaying borrowers to substitute Treasury obligations for mortgages, instead

of providing a substitute property of equivalent risk. Defeasance is also objectionable since it applies even to borrowers prepaying below market notes."

The clause in the *Merchandise Mart* case was not a defeasance clause because it did not require the borrower to "substitute" any collateral for the remaining term of the loan in lieu of prepayment; it called for the present payment of a fee at the time of prepayment. Neither the borrower nor the lender was actually required to purchase a comparable security instrument at the time of prepayment; the instrument was simply to be "available" and used as the benchmark for calculating the prepayment amount (if any) owed by the borrower. Also, unlike a defeasance provision, both parties agreed that if the rate for the comparable investment instrument were greater than the 9.75% contract rate of the mortgage, the borrower would not be obligated to pay any prepayment premium. (For a general discussion of the meaning, scope and enforceability of mortgage defeasance provisions, as well as other "funky" fees and charges such as "exit fees" -- also common in securitized and mezzanine-financing transactions -- see the section on defeasance provisions in the author's article entitled *Enforceability of Prepayment Provisions in Commercial Loan Documents*, which is located in the Mortgages and Financing section on the author's Web site; see <http://www.firstam.com/faf/html/cust/jm-articles.html>.)

8. It is hard to believe, upon reading the circuit court's opinion, that Mart Owners alone was justified in its alleged belief that no prepayment fee would be due under the mortgage provision, and that MetLife was not reasonably justified in its interpretation of the clause. The testimony, as reflected in the circuit court's opinion, was clear that Mart Owners and its counsel at all times fully expected to pay a substantial prepayment premium in accordance with the mortgage provision (even going so far as to hire a consultant, on a contingent-fee basis, and special outside counsel to attempt to negotiate a reduction in the fee). Mart Owners even factored this expectation into the contract for the sale of the Mart to Vornado, and obtained Vornado's agreement to pay a portion of the prepayment fee. Mart Owners did not protest and made no objection whatsoever when, months before it decided to contest the amount of the premium, MetLife informed Mart Owners that the comparable investment would be an "A" rated corporate bond. Perhaps the strangest statement by the circuit court is the following, which appears on page 108 of its opinion:

MetLife knew or had reason to know that Mart Owners attached that meaning (suggested by Mart Owners) to the provision, and Mart Owners did not know or have reason to know that MetLife attached a different meaning to the provision. Accordingly . . . the provision has the meaning attached by Mart Owners.

The circuit court (and apparently, the appellate court) apparently was telling MetLife what they *really* were thinking instead of what they thought they were thinking. This is Alice in Wonderland stuff.

9. There is arguably a problem with giving a trial court carte blanche to determine "equivalent value" where the mortgage provides that a matter is to be resolved by the lender's "good faith" determination. "Inequitable conduct" is in the eye of the beholder (i.e., the trial judge), and in this case the circuit court stated that it had the absolute right and the ability to make "alternative findings when the interest of judicial economy and expediency dictates." The circuit court arrogated to itself the right to "conclude[] that a proper objective [?] approach to this problem would have been to assign a value to all of the issues raised [as subjectively determined and evaluated by the court] and equate those values to corporate bonds as follows:" [the circuit court then set forth, in chart form, its assignment of a "rating" and "value" for each of the factors -- weighted exactly the same! -- that it believed were relevant in analyzing the quality of the loan and its comparability to other security instruments]. The circuit court arrived at an overall "average" B+ bond rating for a comparable security instrument, which was only one rating level lower than that determined by the lender, and concluded that therefore no prepayment fee was payable.
10. The foregoing concerns are, of course, not a defense of the "unique" and unwise language contained in the MetLife's mortgage prepayment provision. But the *Merchandise Mart* case, as upheld on appeal, may set a dangerous precedent. On the other hand, as mentioned above, this is really a contractual-interpretation case and not a true prepayment case, and should pose no threat to the enforceability of standard yield-maintenance prepayment provisions. The *Merchandise Mart* case has little or no precedential value as applied to standard yield-maintenance prepayment provisions. Lenders can easily avoid a similar unfavorable ruling by proper and careful drafting of prepayment provisions to provide for reference to objective criteria to determine the applicable prepayment premium.