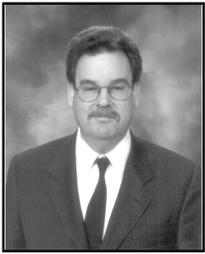


CMDA Assists Clients Affected by Current Commercial Real Estate Market

March, 2009



Gregory A. Roberts

The past couple years, the focus has been on the cascading effect of the housing crisis, loan defaults, foreclosures and how the credit crisis has dried up traditional sources of mortgage financing. The impact is felt nationwide, however it is especially difficult in Michigan. The economy is facing a widely predicted collapse in the commercial property markets. These problems have lagged the residential property crisis but may ultimately disrupt real estate and credit markets more drastically than we have yet experienced.

Attorneys at CMDA represent the entire spectrum of groups affected by the commercial real estate markets. Part of our service is to anticipate how our clients may be impacted and to assist them in developing proactive plans to control or minimize adverse consequences.

Problems become more complex with commercial real estate in large part because of the number of parties or interests involved and the nature of commercial real estate investments. We have consulted with people at every level of this field. There are problems business tenants have with landlords in default and lease commitments in failing or mostly empty strip malls or buildings. Landlords face the reverse problems, emptying buildings or retail space in a contracting market and tenant bankruptcies. The nature of some retail developments can leave large buildings empty for years from defunct retailers who owned the land their stores occupied. Financial institutions or investors contributing to construction loans, mezzanine loans and commercial mortgages may be from in state, out-of-state, international or all of them combined. Many large pension funds, including huge institutions like Calpers or TIAA-CREF are heavily invested in commercial real estate. The insurers, reinsurers and companies that otherwise secure commercial debt have been decimated

and the ability of many to fulfill their obligations is in doubt. At every level there are competing interests, rights and alternatives for action. No matter where you stand in relationship to these markets, it is smart business to develop some contingency plans.

Of all the issues associated with the problems in commercial real estate few have as much immediate impact as property maintenance and preventing blight. Because of our large municipal client base and work with state, county and local officials, we have been getting regular reports of the challenges facing our communities. They are simultaneously being hammered financially with corresponding reductions in the personnel trained and assigned to work with commercial property interests or problems.

In addition to maintaining the public infrastructure that serves commercial property such as sidewalks, road approaches and sewers, the property (even when vacant) still requires police, fire and similar services. Since in large part these services are funded through property taxes, the reduction in tax assessments or outright bankruptcies of owners threaten the funds for the services when then are most needed. Vandalism and building stripping constitute a statewide crime wave.

CMDA is listening to the Building Officials, City Engineers, DPWs, Road Commissions, Township Officials and commercial property interests and working at every level to establish a dialogue on how to prepare for any crisis with commercial property. We all share a hope that the problems will be shorter and less severe than currently expected. However, if recent past is prologue, we have to recognize the distinct possibility of a sharp, deep and costly contraction in all facets of commercial real estate. CMDA stands ready to consult with persons, companies and communities to address their concerns.

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Michigan Supreme Court Allows Discovery of Electronically Stored Information in Michigan Courts

In December 2006, an amendment to the Federal Rules of Civil Procedure went into effect to permit discovery of “Electronically stored information” (ESI) in litigation in the federal courts. The amended federal rules define ESI as, “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations- stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.”

Effective January 1, 2009, the Michigan Supreme Court has followed suit and amended the Michigan Court Rules expressly to allow discovery of “Electronically Stored Information” in cases in the Michigan courts. Unlike the federal rules, the Michigan rules do not define what constitutes ESI. Logic would suggest, then, that an everyday understanding of the phrase, “electronically stored information,” applies. If a party in litigation makes a discovery request to another party for “information” and that information is “electronically stored,” the responding party can be reasonably sure that the information qualifies as ESI.

The federal rules require that ESI be produced in the “form or forms that it is ordinarily maintained or in a reasonably usable form.” The Michigan ESI rules are silent on the manner in which ESI is to be produced, leaving it to the responding party to decide how best to provide the ESI, including the most cost-effective manner. Copying voluminous information onto a CD-ROM to provide to another party, for example, may be faster and cheaper than printing out reams of paper.

In both federal and Michigan courts, if ESI is deleted in the ordinary course of business and cannot be produced in response to a discovery request, the court may not penalize a party, so long as the deletion or loss occurs in the “routine, good-faith operation of an electronic information system.” So, for example, if a website or page changes on a regular schedule (daily, weekly, monthly, etc.), and the former version of the webpage is overwritten or lost to cyberspace, a court may not impose costs on the responding party for failing to produce the former version, absent exceptional circumstances.

The amended Michigan rules also feature some protections for litigants that the federal rules do not provide. In Michigan, there is no greater duty to save ESI than any other type of document or information. Good practice dictates, however, retention of all information, electronically stored or otherwise, as soon as the possibility of litigation is known. Then an adverse party cannot accuse you of destroying information and potential evidence for use in litigation.

The Michigan rules also allow a party not to produce ESI from “sources that the party identifies as not reasonably accessible because of undue burden or cost.” However, if the court hears a

motion regarding whether the ESI should be produced, a party from whom the ESI is sought bears the burden of demonstrating to the court the undue burden or cost. Even if a party shows undue burden or cost, the court may still require production of the ESI, but it may impose conditions on the production. Conditions could include that the requesting party bear some of the cost of production.

As technology continues to expand, so too are the sources and forms of data and information that could be relevant in litigation continuing to grow. Just ten years ago, discovery of ESI was extremely rare and not even addressed by the court rules. Now both Michigan and federal courts have the means to deal with exchange and disclosure of information stored in various formats. These new rules give litigants and their attorneys more certainty of their rights and duties when requesting and turning over ESI.

EXAMPLES OF ELECTRONICALLY STORED INFORMATION (ESI)

- Documents created using text editing or word processing programs
- Documents created using spreadsheet, presentation, financial or any other type of data applications
- Documents originally created on paper, but scanned or recorded and stored on CD-ROMs, DVDs, microfiche, cassette tapes, or other electronic media
- Computer files generated from financial or other transactions on the Internet
- Digital photographs, including from cell phones, PDAs, Blackberry devices, etc.
- Video recordings on any medium (Blu-Ray disc, DVD, VHS tape, Beta tape)
- Web pages or web sites, including cached, overwritten or former versions
- Screen shots capturing activity on a computer or Internet activity
- E-mail
- Sound and voice recordings of any kind, including voice mail and voice recordings of notes on cell phones or personal recorder
- Instant messages sent through services such as AIM, MSN Messenger and Yahoo Messenger, to the extent they are stored by a user
- Messages sent and received on Internet social networking programs, like My Space or Facebook
- Information kept in any other format that qualifies as “electronically stored”

The Darker Side of Bankruptcy: Adversary Proceedings Against Creditor

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Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

ON LAW is a monthly publication from CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features or comments to the editor should be addressed to the attention of Jennifer Sherman.

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