As more and more business transactions and communications are conducted via e-mail or other electronic means, the law has recognized the significance of such electronically stored information to litigation. Specifically, the Federal Rules of Civil Procedure have been amended to reflect the discoverability of electronically stored information, meaning that parties to a lawsuit may seek this type of information from each other in what is commonly referred to as “e-discovery.” This development is important to our clients because, as part of e-discovery, businesses must preserve relevant electronically stored information (“ESI”), such as e-mails, word processing files, computer databases, and all other items stored on a computer, when litigation is commenced or is reasonably anticipated. Failure to do so frequently leads to allegations of intentional document destruction, which may result in the Court ordering substantial monetary sanctions, unfavorable jury instructions, dismissal of claims, and/or default judgments against the offending party. Fortunately, there are proactive steps that businesses can take to be prepared for the e-discovery aspect of litigation.

UNDERSTANDING THE “ANTICIPATION” REQUIREMENT
Initially, it is important to understand that a business’s obligation to anticipate litigation means that the need to retain and preserve ESI may arise long before a lawsuit commences. For example, a government inquiry, the termination of a disgruntled employee, or a serious accident occurring on business premises raises red flags as to future litigation. Thus, it is important that managers, supervisors and human resources personnel understand the importance of communicating red flag incidents to appropriate persons, such as corporate officers, general counsel, or outside counsel.

DOCUMENT RETENTION/DESTRUCTION POLICY
Federal Rule of Civil Procedure 37(e) provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” It is advisable, therefore, for businesses to implement a defensible business-wide document retention/destruction policy that retains and destroys ESI pursuant to a reasonable, systematic and uniform schedule; is mandatory for and followed by all employees; and can be quickly and easily suspended when the need arises.

MAINTAIN AN E-DISCOVERY DIRECTORY AND MAP
One of the most cumbersome aspects of locating and producing ESI for e-discovery purposes is determining the location, accessibility, and retention/destruction schedules for all sources of information used by a business (e.g. voicemails, document management systems, databases, networks, Web-based content, cell phones, personal digital assistants, and personal computers with remote access).

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SUCCESSFUL FINANCIAL RESTRUCTURES

By Jodie Leigh Grabarski

In today’s economy, with the cost of fuel and other inputs increasing, every business owner is feeling at least a financial pinch. Some businesses, however, may be dealing with more serious financial issues and may need to make some calculated decisions. In these cases, the operator may need to consider a financial restructure, a sale of his or her business, or even bankruptcy.

When a business owner finds his or her business with more liabilities and debts than assets and cash flow, thoughtful and informed decision-making is key. Bankruptcy is an option but it is a final option. For an over-leveraged business, a bankruptcy filing is typically not the best course of action, unless the owner is ready to exit the business permanently. While the bankruptcy will extinguish the debt obligations that the business cannot keep current, it will also extinguish the ability of the business to grow in the future.

Another alternative is a restructure or a work-out. A restructure may be an excellent option to permanently or temporarily stop the financial pressure a business is facing. A successful restructure involves cooperation from all creditors of the business. However, the most important participant, in addition to the borrower, will be the senior lender. The opportunity to restructure a business can only be undertaken if the senior lender will cooperate. In short, a restructure is a written plan for the future of the business where long term debt is written down to serviceable levels or the principal is re-amortized to allow lower payments over a longer period of time. In some rare cases, some portion of the debt is forgiven entirely. To the extent practicable, the borrower should encourage participation from unsecured creditors and landlords as well.

The intended result of the restructured senior debt, and any other debt, is the creation of cash flow to fund the daily business operations. Use of this “new” cash flow, however, is restricted. The lender who has “created” the cash flow through its restructured loan sets forth a specific payment order or “waterfall” which directs to whom any cash flow, and most importantly any excess cash flow, must be paid. The goal of the waterfall is to get the business operating again as a going concern and not a business consumed by managing its financial situation.

Typically the payment order will direct that current liabilities and operating expenses, such as suppliers and landlords, be paid first. Franchisors or licensors, as well as the senior lender, will be paid next. The plan may also mandate payments for capital expenditures, if such expenditures are immediately necessary to preserve the business. In other cases, reserves from the cash flow will be created to fund future capital expenditures and liquidity reserves for unexpected expenses, economic downturns or business fluctuations. The reserves will be required to be deposited into an account over which the borrower has limited or no control.

Excess cash flow, in most cases, will be paid to the senior lender who has undertaken the restructure. The excess cash flow may be used as a pre-payment of the re-amortized debt, or in cases where the senior lender has written down original principal amounts, may be paid under “hope notes” or “claw back notes.” Such aptly-named negotiable instruments are an attempt by a lender to get back to par on the original obligation.

The terms of restructure plans can be a few months to several years. With such plans come additional and more stringent financial reporting obligations. Financial covenants are tightened and testing of such covenants can occur as frequently as weekly, but are typically monthly. As indicated, cash flow from the business is very restricted as to use. Salaries and distributions to the operators or owners of the business may be restricted or prohibited.

Finally, a restructure that is pursued only to delay the inevitable is not good business for anyone. Unrealistic economic projections as to sales and volume in the operation does not allow for true financial recovery. It is a rare business that can experience a strong upturn rapidly. Projections should be conservative and based on flat or negative economic performance, especially in the current economy.

The key to a successful restructure is committed parties with experienced advisors. Our team has been involved in restructures in a wide range of businesses, with the debt facilities in a wide range of dollar amounts. The business, financial and legal aspects of the restructure plan must each be considered. If your business is facing financial stress from the current economy, contact corporate attorney Jodie Grabarski at (952) 885-5999 or jgrabarski@krassmonroe.com.
It seems you can’t turn on the news or read a newspaper these days without seeing a feature story on the plight of the country’s real estate market. The downturn has been worsened of late by the overall economic recessionary woes of the past year. Although most of the media coverage and concern is rightfully placed upon the residential mortgage situation and the collateral damage that record rates of foreclosures are causing homeowners, communities, lenders and government authorities, the commercial and retail leasing world has not escaped the softening market conditions.

The general unsettled nature of the business climate and the slowdown in retail growth these days have led to commercial lease rates and concession packages becoming increasingly “tenant friendly.” Just one example of a lease concession that has continually evolved into a very valuable item for tenants is the inclusion of tenant improvement dollars in a lease. While the concept of tenant improvement allowances have been a customary term of leases for many years, recently they have become broader in what they cover and, hence, more favorable to the tenant.

Tenant improvement allowances were once only reserved for the costs associated with the interior build-out and finishes of a leased space (following delivery of a “shell” space from the landlord), or to purchase fixtures to be placed upon the premises. Under such a scenario, the landlord often benefited from the monies spent by a tenant because, even if a tenant (and its rent stream) did not stay in a space long enough for the landlord to realize the investment it made in providing the tenant improvement dollars, it ultimately retained the value of the improvements or fixtures (which generally become the property of the landlord upon installation in a space). Today, however, a tenant can often negotiate to use tenant improvement dollars for the purchase of furniture and equipment or cabling within a space, items upon which a landlord may have little or no proprietary interest.

With the market becoming increasingly “tenant friendly,” it makes sense to audit your current lease to see if there is a potential early termination right or any other provision that could provide leverage as you seek to renegotiate more favorable lease terms. Alternately, if you are in the market for new space or your current lease is near expiration, the time has never been better to explore available options in the marketplace. Free rent, shorter lease terms with limited or no personal guaranties, increasingly large amounts of flexible tenant improvement dollars, as well as signage and building naming rights are being offered by nearly every landlord.

Real estate attorney Shanna L. Strowbridge regularly counsels clients in the negotiation of commercial leases. You can reach her at (952) 885-5999 or sstrowbridge@krassmonroe.com.
Accordingly, it is preferable to compile this information in advance and continue to update it as technology and personnel changes occur, so that it is readily available if and when litigation is anticipated or arises.

**FORM AN E-DISCOVERY TEAM**

Finally, it is never too early to designate an e-discovery team that will manage the document retention/destruction policy, compile and maintain the e-discovery directory and map, receive concerns about anticipated or potential litigation, respond to litigation hold letters, suspend destruction when necessary, and oversee the collection, review, and production of ESI. Ideally, such a team should consist of outside counsel, general counsel, human resource managers, records management personnel, and members of the IT department and/or an outside vendor of ESI services.

While ESI and e-discovery creates new burdens for businesses, a proactive approach can eliminate many potential pitfalls.

*For more information about the impact of ESI and e-discovery on anticipated or pending litigation, contact litigation attorney Molly Hamilton at (952) 885-5999 or mhamilton@krassmonroe.com.*

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**OUR PEOPLE . . . OUR STRENGTH**

Congratulations to the 2008 recipients of the Tim Moynihan Scholarship. The scholarship was established in memory of attorney Tim Moynihan to assist employees and children of employees with their education expenses. Scholarships were awarded to Kyle Kalmoe, son of Bruce Kalmoe, Karise Sonia, daughter of Lynn Sonia, Sophie Bruber, daughter of Danea Bruber and Michelle Johnson, daughter of Greg Johnson.

Krass Monroe welcomes:

- **W. Barry Blum**, a franchise lawyer with over 25 years of experience as a litigation attorney and as a senior executive in legal and franchising roles for Burger King Corporation. Barry joins our Franchise, Distribution and Intellectual Property, Corporate Finance and Mergers and Acquisitions practice groups as OF COUNSEL.
- **JoAnne Daudt**, a new attorney in our Wealth Preservation practice group. Her practice focuses on estate planning, probate law and business law.
- **Rachel Broten**, our new summer associate. Rachel attends the University of St. Thomas School of Law and she has completed her second year.

The firm wishes to recognize and congratulate our Chief Operating Officer, **Mary Franklin**, on being selected as a Minority Business honoree by the *Minneapolis St. Paul Business Journal*. Her selection was published on June 13, 2008. Mary was one of eleven executives honored in the Minority Corporate Executives category. According to Dennis Monroe, firm chairman, “Mary has created a total strategic approach to our business and has set the stage for the firm to go to the next level.”

Congratulations to **Jim Wahl** who is listed in “Who’s Who in Intellectual Property” in the June/July issue of *Minnesota Law & Politics* magazine. Jim is Co-Chair of the firm’s Franchise Distribution and Intellectual Property practice group.

Congratulations to **John Berg, Randy Evans, Andy Hall, Scott Husaby, Tom MacIntosh, Dennis Monroe** and **Jim Wahl**. They have been selected and honored by *Franchise Times* magazine as franchising’s Legal Eagles for 2008.