

MARKS CLARE & RICHARDS, LLC, WINS \$1.5 MILLION BEFORE NEBRASKA SUPREME COURT

Marks Clare & Richards, LLC, represented by Steven J. Riekes, recently won a significant commercial case before the Nebraska Supreme Court. The case is Builders Supply Co., Inc. v. Czerwinski, 275 Neb. 622, decided May 9, 2008. (This case is also the feature article in "Commercial Lending Litigation News," Volume 21, Number 3, of June 5, 2008.) The Court awarded Builders Supply Co. approximately \$1,500,000 and directed the trial court to make a determination of pre-judgment and post-judgment interest.

In 1989, Benchmark Homes, Inc., a corporation owned by John Czerwinski, was heavily in debt to Builders Supply Co. Builders Supply Co. agreed to continue to extend credit to Benchmark only upon the personal absolute and unconditional guaranty of John and Barbara Czerwinski. The personal guaranty was collateralized by deeds of trust on real estate owned personally by John, not Benchmark, in which Builders Supply Co. indicated it would not extend credit to benchmark for more than \$525,000 at any one time.

In 1991, it appeared that Benchmark had paid what it then owed to Builder's Supply Co. and was doing well financially, at the request of John, Builders Supply Co. released the deeds of trust.

After a number of years, Benchmark began having financial difficulties, and was heavily in debt to Builders Supply Co. for almost \$1,500,000. John died and Benchmark went bankrupt. Builders Supply Co. sued Barbara on her guaranty.

Barbara's two defenses were that (1) by releasing the deeds of trust, her rights of subrogation were impaired, and (2) the credit agreement limiting the amount of credit to \$525,000 to Benchmark should be read together with the guaranty to provide a cap on her liability.

While Barbara's arguments convinced the trial judge to award her summary judgment, with no liability to Builders Supply Co. It held that the guaranty agreement was a separate contract from the credit agreement, and, therefore, the credit limit was not a matter that should have been read into the guaranty agreement, which was absolute and unconditional, of all debts owed. The Court further said that Barbara's actions subsequent to the release of the deeds of trust by Builder's Supply Co. indicated that she waived her contention that her right of subrogation had been impaired.

The court awarded Builders Supply Co. approximately \$1,500,000, and directed the trial court to make a determination of pre-judgment and post-judgment interest.