

Forefront

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O'Keefe Contributors:



Susan Koss, CPA/ABV/CFF, CVA
Partner and Managing Director

Ms. Koss specializes in litigation support, business valuation and forensic accounting services. Her knowledge and experience in litigation support includes breach of contract, lost profits, economic damages, and fraudulent conveyance matters. She has also performed numerous business valuations utilized in estate tax resolution, shareholder disputes, marital dissolution, and merger and acquisition transactions. Additionally, Ms. Koss has prepared complex financial analyses utilized in business turnarounds and bank workout assignments for clients.



Russell Long, CPA/ABV/CFF
Partner and Managing Director

Mr. Long specializes in litigation support, business valuation, turnaround consulting and receiverships. Mr. Long is also responsible for leading forensic accounting teams in the investigation of "Ponzi" schemes and complex business matters. He has worked with the FBI, SEC and other law enforcement agencies providing investigative support including reconstructing the accounting records in a large west Michigan bankruptcy case resulting in a \$25 million recovery. Mr. Long acts as a receiver for commercial & residential properties as well as operating businesses and is responsible for all aspects of the assignments including the disposition strategy.



Andrew Malec, Ph.D.
Partner and Managing Director

Dr. Malec is a recognized expert with over 15 years of experience in providing economic advisory services, litigation support, and valuation opinions to litigators in complex, commercial matters. Dr. Malec has demonstrated experience in litigious matters including, but not limited to, automotive recalls, statistical analysis, breach of contract, intellectual property, and shareholder disputes. Dr. Malec regularly testifies in state and federal courts on a variety of high-level litigious matters, and is expert in communicating complicated economic topics in a simple, clear, and easy to understand manner.



Carolyn Riegler CPA/CFE
Director

Ms. Riegler specializes in litigation advisory services, dispute resolution, forensic accounting services and business valuations. Her experience includes advising on complex real estate transactions, business and shareholder disputes, litigation damage quantification, lost profits, and valuation of privately held business interests. Additionally, Ms. Riegler has evaluated financial forecasts for bank workout agreements and business turnaround assignments. In addition to her CPA credentials, Ms. Riegler is also a Certified Fraud Examiner and a Licensed Real Estate Broker.



Which Expert?

CHOOSING AN EXPERT WITNESS OR CONSULTANT...

By Susan Koss

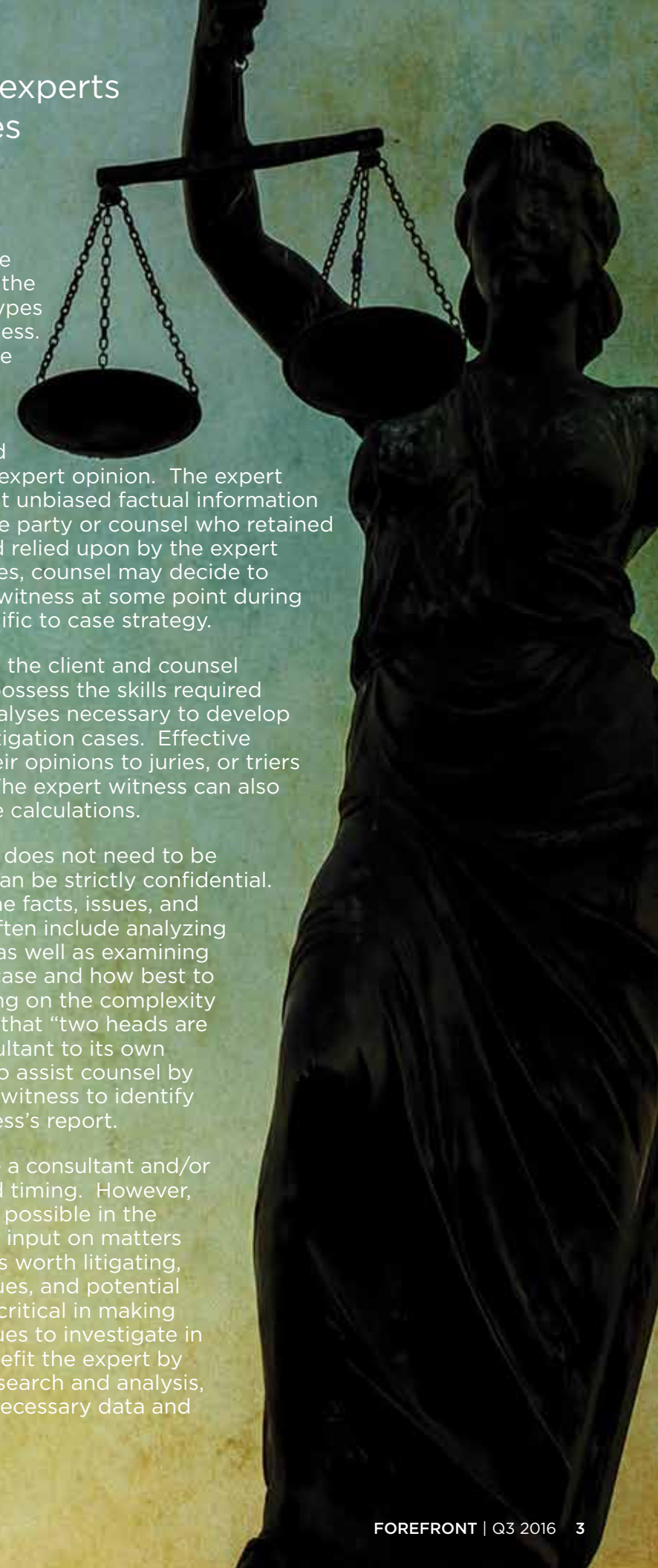
During the litigation process, experts are extremely valuable sources of knowledge and assistance to attorneys.

Experts can be useful to counsel from the time before a Complaint is filed, and continuing all the way through trial. Essentially, there are two types of experts: the consultant and the expert witness. The consultant is retained by counsel to advise on case issues, but is not expected to provide testimony. Any documents created by the consultant may be protected by attorney-client privilege. The expert witness is retained to testify at trial and express an independent expert opinion. The expert witness holds a high degree of duty to present unbiased factual information or opinion, independent of the influence of the party or counsel who retained the expert's services. Documents created and relied upon by the expert witness are subject to discovery. In some cases, counsel may decide to designate the expert consultant as an expert witness at some point during the litigation process for various reasons specific to case strategy.

An expert witness provides credibility to both the client and counsel during litigation. Financial expert witnesses possess the skills required to undertake and perform the quantitative analyses necessary to develop the technical evidence required in complex, litigation cases. Effective expert witnesses are able to communicate their opinions to juries, or triers of fact, in an easily understandable manner. The expert witness can also rebut opposing expert's opinions and damage calculations.

Counsel may choose to hire a consultant who does not need to be designated and whose advice and guidance can be strictly confidential. Consultants are often hired to advise about the facts, issues, and strategy of the case. The work product will often include analyzing and discrediting the opposing expert's work, as well as examining the strengths and weaknesses of the client's case and how best to represent the financial facts at trial. Depending on the complexity and strategy of the case, counsel may decide that "two heads are better than one" and may hire a backup consultant to its own testifying expert. Finally, a consultant can also assist counsel by reviewing the work product of its own expert witness to identify shortcomings or strengths of the expert witness's report.


Many dynamics will impact the decision to hire a consultant and/or expert witness such as case strategy, cost and timing. However, it is vital to find the right expert(s) as early as possible in the case. Early retention allows counsel to obtain input on matters such as whether or not the value of the case is worth litigating, identification of key financial or economic issues, and potential settlement value. Also, expert advice can be critical in making the most of fact discovery and identifying issues to investigate in deposition. Lastly, early participation will benefit the expert by providing sufficient time to do appropriate research and analysis, and providing the opportunity to obtain the necessary data and information integral to the expert's opinion.





Creditor Trusts

By Russell Long



An important tool for unsecured creditors in a Chapter 11 bankruptcy proceeding is a Creditor Trust (“Trust”). Such a Trust can be used in conjunction with a Sec. 363 sale process, a wind down and liquidation, or where a debtor’s business emerges with a plan of reorganization (“Plan”). However, the focus here will be on the use of a Creditor Trust where the reorganized business emerges from bankruptcy, a stronger, more competitive enterprise.

In a true Chapter 11 reorganization, a Creditor Trust allows the debtor to emerge from the bankruptcy process, focus on improving the business, and eliminate the bankruptcy related reporting requirements and trustee expenses. Using such a Trust post-confirmation provides a cost-effective means for the unsecured creditors to ensure the debtor adheres to the Plan. Payments are made to the Trust, and ultimately the unsecured creditors, in a timely manner according to the terms of the Plan. If the debtor defaults on the terms of the Plan and there is a properly documented Creditor Trust Agreement in place, the Creditor Trustee will have the authority to take control of the business and sell it as a going concern, or liquidate the assets in an orderly fashion to maximize the return to the unsecured creditors.

The debtors and the Creditor Trustee form a Creditor Trust pursuant to the Plan. The assets of the debtor are pledged to the Trust and the Creditor Trustee is usually empowered to administer the Trust assets and take action on behalf of the Trust in order to maximize the return to the beneficiaries of the Trust, the unsecured creditors. The Creditor Trustee, acting under the authority of the Creditor Trust Agreement, may have the authority to: hold title to the business assets including voting power, assume management control of the business, oversee and direct the issuance of distributions

according to the Plan, oversee and direct the prosecution or defense of claims, and retain professionals if necessary. In some cases, the Creditor Trustee is charged with providing guidance to the debtor during the trust existence to ensure the Plan is successful and the turnaround of the business is sustainable.

The Creditor Trustee’s authority is dictated in the language of the Creditor Trust Agreement and the Disclosure Statement filed with the bankruptcy court prior to the hearing on the feasibility of the Plan and confirmation. A carefully crafted Creditor Trust Agreement will give the Creditor Trustee the power he/she needs to oversee the operations of the reorganized debtor without further authorization from the Bankruptcy Court, ensure the Plan governs the process, and safeguard the unsecured creditors’ interests under the Plan.

In a Chapter 11 bankruptcy setting, Creditor Trusts are valuable as they assist the debtor to formulate and confirm a Plan that is agreeable to the unsecured creditor’s committee. Insight into the value of a Creditor Trust and utilization of the power entrusted in the Creditor Trustee can result in the successful recovery for the unsecured creditors with the emergence of a sustainable, reorganized business.



The Next Generation

PRESERVING THE FAMILY BUSINESS

By Carolyn Riegler

The family-owned business has an unusual set of relationship issues. Multiple generations work side by side. Separation of work and family roles, although desired, is almost impossible. Weaving the family dynamics with business challenges is a combination of deliberate planning and tough decisions. Many of our clients are successful family-owned enterprises. They have gone through tough times, and have made choices to ensure the viability of the business for the next generation. Passing the torch is a difficult process, many family businesses do not survive through the second or third generation.

Our experience shows that a third party is often the bridge that can help the business transition successfully. An outsider brings clarity and experience, unfettered by lifelong relationship issues between parents and children, cousins and grandparents. The privately owned business will benefit from addressing a multitude of issues with their trusted advisor.

Strong businesses plan for success through strategic methods and techniques. The family business must also operate with discipline and forethought to ensure its viability for generations to follow. Three core areas set the foundation for building the future. A third party advisor can help you achieve your goals through a combination of establishing the business rules and framework, training and developing your talent and strategic reflection and planning for the future.



1. Establish Team Rules

Developing clear succession plans and shareholder agreements are key. Future expectations should be set early and communicated clearly to all members of the family. Agreements need to outline critical issues such as: Who will be in charge? How will decisions be made? Who will own the company? How will stock or member interests be transferred between family members? Who will have rights to future cash flows and profits? Should gifts be passed to minors, future descendants? Putting the rules in writing, reviewing, and updating them on a regular basis can prevent family dissent from distracting the business from its core purpose.

2. Train the Team

The founding member of the business often has talents which enabled them to build the business. These talents are not always shared by the next generation. It is important to assess each member's skills, strengths and weaknesses to plan for their success. Formal education and training, externships with other businesses, internal department rotation, and coaching are just a few techniques used to facilitate the planned development of younger family members to prepare them to lead.

3. Reflect and Revise

Successful family-owned businesses often have a planning and advisory board made up of non-family members to help them plan for the future, and reflect on the past. A group of trusted, experienced advisors willing to communicate the truth, even if it means conflicting with management, is priceless. The board should consist of individuals respected by family members; attorneys, CPAs, other family business owners, and community leaders are all good prospects for the advisory board. Meetings should be held on a regular basis, perhaps monthly or quarterly, depending on the business needs. Family management should be tasked with making formal reports and status updates to the board, promoting an environment of accountability. The board can help the management team "stay the course" or change direction on a dime when needed to facilitate success. Advisory board members can also help mediate family conflicts to avoid lengthy and costly litigation between family members.



ENHANCED ECONOMIC DAMAGES

IN PATENT INFRINGEMENT MATTERS

By Andrew Malec, Ph.D.

In a case of infringement, Section 284 of the Patent Act provides that courts “may increase the damages up to three times the amount found or assessed.”

- 35 U.S.C. §284.

In *In re Seagate Technology, LLC*, 497 F. 3d 1360 (2007) (en banc), the United States Court of Appeals for the Federal Circuit adopted a two-part test for determining when a district court may increase damages pursuant to §284. Under *Seagate*, a patent owner must first:

1. “Show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *Id.*, at 1371.
2. The patentee must demonstrate, again by clear and convincing evidence, that the risk of infringement “was either known or so obvious that it should have been known to the accused infringer.” *Ibid.*

Only when both steps have been satisfied can the district court proceed to consider whether to exercise the discretion to award enhanced damages (i.e., the district court has the discretion to determine the amount of the enhancement up to three times the award of compensatory damages). However, in a recent June 13, 2016 United States Supreme Court decision, Chief Justice John Roberts delivered a decision in *Halo Electronics, Inc. v. Pulse Electronics, Inc., et al.* that overturned *Seagate’s* two-part test for willful infringement because it was “unduly rigid.”

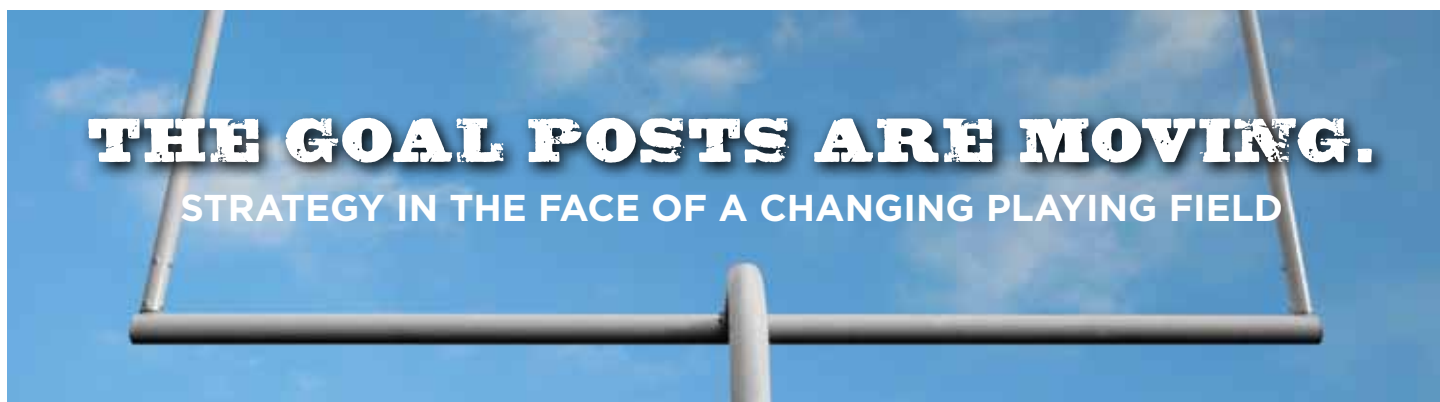
In *Halo*, the jury found that *Pulse* had infringed *Halo’s* patents and that there was a high probability it had done so willfully. However, the District Court declined to award enhanced damages under §284 after determining *Halo* had failed to show objective recklessness under the first step test of *Seagate*. The Federal Circuit affirmed.

In his opinion, Chief Justice Roberts states, “The *Seagate* test reflects in many respects, a sound recognition that enhanced damages are generally appropriate under §284 only in egregious cases. That test, however, ‘is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts.’...In particular, it can have the effect of insulating some of the worst patent infringers from any liability for enhanced damages.” Chief Justice Roberts notes that §284 gives district courts the discretion to award enhanced damages against those found liable of patent infringement and further states, “In applying this discretion, district courts are ‘to be guided by the sound legal principles’ developed over nearly two centuries of application and interpretation of the Patent Act.”

The result of this recent decision by the United States Supreme Court allows courts to use their discretion in awarding enhanced damages and not be encumbered by the rigid two-part test adopted in *Seagate*.

O'Keefe Named Winner at Global M&A Network Awards

At the Global M&A Network in New York, O'Keefe was a finalist for Boutique Firm of the Year and was awarded two Turnaround Atlas Awards: "Chapter 11 Restructuring of the Year" and "Community Revival Restructuring of the Year." Patrick O'Keefe was also honored with the 2016 "Leadership Achievement" award for his involvement nationally in delivering creative solutions to troubled businesses as recognized by his peers and for leadership in the industry.



By Patrick O'Keefe | Founder and CEO

With the latest round of international events (terrorist activity and BREXIT) creating financial uncertainty, we see a scenario where liquidity in the marketplace may become tight. We are currently advising clients to tie up their capital sources for longer term deals. Banking regulation continues to hamper our regional banks serving the middle market. Shadow banking is becoming a large part of commercial liquidity with little if any government

oversight. The upcoming presidential election poses another field of uncertainty. It has not been that long since the liquidity crunch of 2009-10 for people to forget what no credit is like. Russia may be forced to make an acquisition or two to bolster its economy. Germany is not going to give the PIGS a free pass and solely shoulder the financial burden of the EU with no voice. The next year will be very interesting.