Forefront

Q4
2016

Inside:

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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, quality of earnings, 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 heads up O'Keefe's Intellectual Property Services Group. He 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. He 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 an expert in communicating complicated economic topics in a simple, clear, and easy to understand matter.

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. 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.

By Andrew Malec, Ph.D.

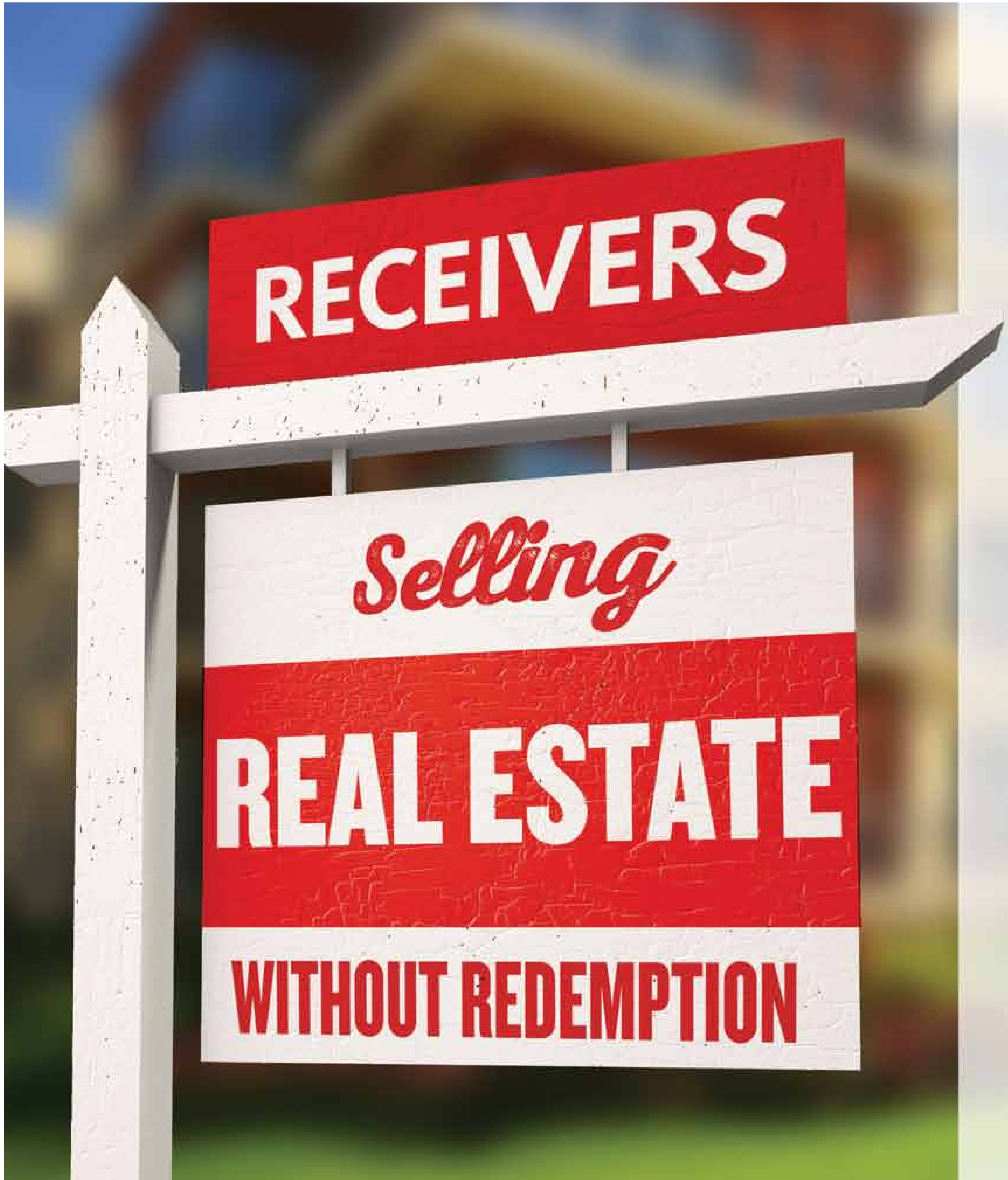
A trademark is one of the most valuable types of intellectual property that a company has because it identifies the brand owner and typically consists of a name, logo, design, or symbol. A trademark is important because it allows the company to differentiate their products from others in the marketplace, which is valuable to the consumer. If exploited properly, trademarks create value for the company by providing a competitive advantage through lower marketing costs, market recognition, increased revenues, greater market share, or faster market adoption.

From an economics perspective, trademarks are appealing to the consumer because they reduce consumer search costs in buying a product. For example, consider the snack food industry where a consumer is looking to buy potato chips. If the consumer is considering Better Made and store brand potato chips, the consumer may choose Better Made over the store brand because the consumer has bought Better Made before and thus the brand connotes an image of quality to the consumer while the consumer is unsure of the quality of the store brand potato chips. Further, even if the customer has never tried Better Made before, the company has built up its brand over time and this is also recognized by the consumer. Therefore, a company with a strong brand presence may require less marketing and advertising expenditures to make a sale than that of its competitors, which provides the company with a competitive advantage and creates value for the company.

It is also true that the seller of a strong brand has the ability to charge a premium for its products because of its reputation. Starbucks is a good example of this. Starbucks can charge more for a cup of coffee compared to fast-food establishments and convenience stores due to its strong brand and its ability to differentiate its products from competing products.

Finally, trademarks can also allow the company to create market share, or allow the company to get to the market faster. The ability to create product loyalty builds market share. And, profitably getting to the market faster allows the company to build market share faster and creates increased value for the company.

We are often called upon to assist in determining the value of a trademark, or to assist in the quantification of economic damages in trademark infringement matters. Since trademarks are one of the most valuable types of intellectual property in the marketplace, companies need to understand the value of its trademark and the need to create an identity with a sustainable competitive advantage.



By Russell Long

I have completed a substantial number of receiverships involving real estate over the last several years and have been asked on more than one occasion "under what authority does a Receiver have the power to sell real estate without redemption?" It's an excellent question without a perfect answer. However, the Michigan Court of Appeals addressed one aspect of receivership authority in its recent, published opinion of Stock Bldg Supply, LLC v Crosswinds Cmtys, Inc, ___NW2d___; 2016 Mich App LEXIS 1685 (Ct App, Sep. 13, 2016).

At issue in the Stock Building Supply case was whether a Court appointed Receiver in fact had authority to sell real estate "free and clear of all claims, liens and encumbrances" -- authority that, over the past several years, has become common place for Receivers in Michigan. The case began in July 2008 when Stock Building Supply, LLC ("Stock") sued the developer and its guarantor to foreclose on its construction liens for failure to pay for materials provided. Church & Church, Inc. ("Church") filed a counterclaim shortly thereafter seeking payment for its liens and mortgages that also arose from supplying materials to certain units. In response, the senior mortgage holder Citizens Bank ("Citizens") filed a cross-complaint seeking foreclosure on all mortgages, including Church's, and also successfully requested the appointment of O'Keefe as Receiver.

Central to Church's, the Third-Party Plaintiff-Appellant, claims were the sale of four specific units, each of which had a $20,000 mortgage. In July 2009, O'Keefe requested the authority to sell one of these encumbered units, "free and clear of all claims, liens and encumbrances without redemption periods, with the proceeds received therefrom to be distributed in accordance with the same priorities as held prior to consummation of such sales." Church's attorney not only received notice, but signed the stipulated order without objection. Thereafter additional sales, including the remaining units encumbered by Church mortgages, were sold and the proceeds distributed to Citizens pursuant to further Court order. In each instance, Church was provided notice and challenged neither the sales nor the distribution until nearly three years elapsed and the case was long closed.

On September 11, 2013, Church moved to have the case reopened alleging it still maintained valid mortgages on the original four units. Church argued the mortgages were not discharged and the trial court did not have the authority to grant the sale without a foreclosure. On January 9, 2015, the Oakland County Circuit Court denied Church's motion, holding that the clear language of its orders and the declaration of O'Keefe that the intent of the language "free and clear of all claims, liens and encumbrances" included Church's mortgages. Church appealed the ruling to the Michigan Court of Appeals. The 2016 opinion addresses a variety of topics relevant for Metro Detroit Receivers and is highly recommended for an indepth review. However, in upholding the trial court, the Court of Appeals specifically noted that while there is neither a rule nor statute that grants Receivers the authority to sell properties free of any encumbrances, "evidence was submitted in the trial court that it was common practice for Receivers in Metro Detroit to request and be granted authority to sell distressed properties free and clear of all encumbrances." Moreover, the Court reviewed law from other jurisdictions and concluded that as long as proceeds from any such sale are applied to a senior lien holder (in this case Church's mortgages were junior to those of Citizen's) that the Trial Court properly exercised their authority.

While the scope of Receivers remains less than easily answered, the Stock ruling sheds some light on the view of Michigan courts.

By Carolyn Riegler

Yes, it is that time of year again. The snow is about to fly as I am writing this article and my thoughts have turned to year end. This is a time of reflection, refocus, and renewal for individuals and for businesses. A time to embark on new goals and gather renewed strength to pursue yet unachieved goals.

All businesses must reassess, not only to survive but thrive through the times ahead. Most businesses participate in some type of annual budgeting process. If your business does not, it should be. What level of thought are you and your colleagues really putting into the process? Are you merely recreating the same old plan, or are you taking a leap outside of your comfort zone? All businesses should take inventory of their finances, people, and technology as the building blocks of their annual planning process.

Financial Review – A thorough financial review includes analyzing key financial indicators that drive the business profitability (or lack thereof). Break down the major components and do a deep dive into key drivers such as revenue, inventory, debt, and cash flow. Assess your customers' purchasing and payment patterns. Perform customer surveys or focus groups to evaluate what more you can provide through either vertical or horizontal integration. Is your debt carry eating up your product profitability? Perhaps it is time to evaluate other financing opportunities for working capital or infrastructure needs. What does your cash flow look like? Do you have a financial "disaster recovery plan"?

People Planning – What if you could create more time in a day? Have you assessed your staffing levels, and placement of staff to ensure you are getting the best alignment of talent and need? People tend to try to fit a person to a predesigned job. What if you could redesign the jobs to maximize your staff's skills? Assess your talent pool, then align it with your needs. You may find a diamond in the rough you didn't know you had. You may have a born salesperson on your accounting staff, or a designer hiding in engineering.

Technology Planning – Technological advancements are happening at the speed of light. It is almost impossible to keep up with the latest and greatest offering. Have you given up trying to keep up because of the mind spinning options available? Many business owners are reluctant to invest in new technology platforms because they fear they will be obsolete before they finish the migration to the latest and greatest. This is truly an area in which you must take a deep breath and jump in. You will be amazed at the potential impact on your business a technological upgrade can have.

Welcome in the new year with fresh ideas and perspective. Focus on a few key improvements to energize your business, your clients, and your bottom line. The time you spend reflecting, refocusing, and renewing will produce a high rate of return.

Go BEYOND Checking the box

By Susan Koss

A quality of earnings report is an important tool for parties involved in the purchase or sale of a business. The primary purpose of a quality of earnings report is to assess the accuracy of the company's historical earnings and the sustainability of earnings into the future. A potential buyer may already understand the reasons why they want to purchase a company, but the buyer really needs to understand the reasons why it may not want to buy a company. A quality of earnings analysis should not be a "check the box" type of analysis since such checklists do not always identify critical problems. Instead, the analysis should be prepared in an effort to look beneath the numbers shown on the books and records. Often times a thorough quality of earnings analysis can assist the buyer in understanding the risk parameters of the transaction. Such analysis can assist in setting representations and warranty sections of the purchase agreement and address issues to be dealt with quickly in post-merger integration. Red flags identified need to be investigated during the analysis in an effort to "peel back the layers of the onion" to get the true understanding of the quality of the earnings of a company.

Some of the components of the analysis may include:

- Assessment of revenue and gross margins by categories and customers
- Trend analysis of historical revenue and operating expenses
- Review of revenue recognition policies and procedures
- Analysis of inventory, receivables and other balance sheet items and working capital
- Identification of one-time or non-recurring expenses
- Validation of revenue and expense projections
- Analysis of management and due diligence adjustments

Generally speaking, it is the purchaser who engages an outside party to prepare a quality of earnings report during the process of a purchase transaction. However, it can be tremendously beneficial for the seller to obtain one prior to selling their business. A seller can gain advantages by understanding the results of the quality of earnings analysis by being prepared to address questions or issues from the buyer. A seller can also benefit for the following reasons:

- Educating the seller on the true sustainable future earnings of the business
- Providing the seller the opportunity to address issues, or concerns, detected during the quality of earnings analysis
- Preventing unwelcome issues from surfacing when the buyer completes its due diligence review
- Identifying issues and risk parameters that could potentially influence the selling price of the business

Uncovering surprises once the due diligence phase begins can significantly weaken the seller's negotiation position. Conversely, not uncovering surprises, that should have been discovered, can provide additional risk to the buyer post-acquisition. Regardless of the party that requests it, a quality of earnings report should not be performed following only a traditional checklist approach. It should be prepared with a unique approach to best understand the risks involved with the company earnings and industry.

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O'Keefe provides intellectual property consulting services. In addition to our independent and thorough economic analysis, we are able to communicate our findings in a clear and easy to understand manner.

Should your matter be litigious, know that our experts are well versed to assist you with discovery assistance, quantification of economic damages, work product rebuttal of other experts, and regularly testify in state and federal courts.

Our intellectual property services include, but are not limited to:

- Trademark, Patent and Copyright Infringement Matters
- Trade Secret Misappropriation Matters
- Valuation of Intangible Assets/Intellectual Property
- Economic/Market Analysis
- Licensing Advisory/Royalty Rate Studies
- Strategic Decision-Making
- Transaction Advisory
- Expert Witness Testimony

Should you require economic analysis of intellectual property, our professionals would be happy to assist you.

Cheers!

The holidays are a good time to reflect and be thankful for the many blessings we have been bestowed. At this special time of year, I would like to thank our clients, friends, and referral sources for utilizing our services in 2016. In the true spirit of the Irish, a toast to you and your loved ones:

May the luck of the Irish be with you,
And your happiness reach new heights,
And whatever road that you travel,
May it be filled with nothing but green lights.

Best wishes to all!!
Pat O'Keefe
Founder and CEO

O'Keefe hires Tim Thompson as Managing Director

Tim Thompson has joined the firm as the Managing Director of the Grand Rapids office. Mr. Thompson has 15 years of consulting, project management, and M&A advisory experience focusing on performance improvement and post-merger integration in a variety of industries including Publishing, Media, Engineering, Construction, and Telecommunications.

Prior to joining O'Keefe, Mr. Thompson was a Managing Director with FTI Consulting where he specialized in organization-wide performance improvement, process re-design, operational cost reduction and back office optimization. Additionally, he led projects in due diligence and integration advisory for the Technology, Media and Telecom practice as well as numerous operational and organizational re-design implementations acting as program manager. Mr. Thompson holds a PMP certification from the Project Management Institute.