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Expert Damages Witness in Distributorship Case Excluded: Testimony/Report FUBAR*

A federal district court in Florida excluded the report and testimony of an expert on the grounds that he failed 2 of the 3 prongs of the *Daubert* test. While he passed the relatively low threshhold of the qualifications test, he failed the reliability and helpfulness tests. Among the flaws noted by the court:

- Reliance on Wikipedia as a source
- Inability to attest to the reliability of his own lost profit analysis
- Deficiency of sampling methodology
- Reliance on arbitrary numbers and speculation
- Impermissible legal conclusions

For more details on what the court found wrong with the expert's report, see. . .

*An acronym developed by the U.S. Army's "greatest generation" in the Mediterranean theater during World War II. See Rick Atkinson, *The Day of Battle* (Volume Two of the Liberation Trilogy), Henry Holt (New York, 2007) p. 36 for explanations of the acronyms SNAFU, SUSFU, SAFU, TARFU, FUMTU, JANFU, JAAFU, FUAFUP and FUBAR.

Beware Franchisor Vindictiveness

Attempted Enforcement of California Post-Term Covenants Not To Compete Can Be Malicious Prosecution

In an unusual action for malicious prosecution the Court of Appeal of California, First District, in a Not for Publication opinion held that U-Haul's actions in bringing a lawsuit in California to enforce a covenant not to compete was violative of California Business and Professions Code §15500 which basically makes such covenants unenforceable in California. [*Robinson v. U-Haul*, CCH Business Franchise Guide ¶14,481 (Oct. 20, 2010)]

The fact that U-Haul had brought such actions in the past which had been dismissed was sufficient to establish probable cause and malice allowing the terminated franchisee's case to go forward for malicious prosecution and as a class action. The mere presence of such unenforceable language in the franchise agreement was considerd grounds for pursuing the class action.

Liquidated Damages vs. Lost Future Royalties

Calculation Based on Past Royalties OK for Hotels, But Rejected For Non-Hotels

In *Radisson Hotels v. Majestic Towers*, decided in 2007, the franchisee was terminated for failure to pay royalties. The franchisor had sued "seeking the recovery of (1) past due fees, (2) liquidated damages, and (3) attorneys'

fees." The court granted "summary adjudication on the issue of past due fees and liquidated damages." The franchise agreement calculated liquidated damages as two times the royalties paid during the prior year because the franchisor alleged that it took them, on average, two years to find a replacement franchisee.

In other cases involving liquidated damages clauses in hotel franchise agreements, courts have upheld the use of past royalties to calculate liquidated damages. Recently, in *Noons v. Holiday Hospitality Franchising, Inc.*, the liquidated damages provision was held to be enforceable under Georgia Law. The test was if: (1) the injury caused by the breach was difficult or impossible to estimate;
(2) the parties intended to provide for damages rather than a penalty; and
(3) the stipulated sum was a reasonable estimate of the probable loss.

However, in non-hotel cases, like *Meineke Car Care Centers, Inc. v. RLB Holdings, LLC*, which is currently on appeal, and *Medicine Shoppe International, Inc. v. TLC Pharmacy, et al*, arguments similar to those made in Radisson were rejected.

For more on these liquidated damages decisions, see. . .

Nexus Notes - "Click Through" Nexus

The current front line for states in their battles to get out-of-state corporations to collect and pay over sales taxes is "click through" nexus which holds that economic nexus derived from the actions of an agent who is compensated is sufficient without physical presence to require on-line retailers to collect sales and use tax. Thus mail order enterprises like Amazon and Overstock have been deemed to have sales tax nexus with jurisdictions where they have aggregators whose websites "click through" in exchange for compensation to the site that does the actual sale, e.g. Amazon.com.

Legislation in the area is in flux. For a summary of the situation in Illinois, North Carolina, New Mexico, Vermont and a variety of other states, see. . .

CyberCrime
More Reasons to Secure Your Network Against Hackers

Here are some links to recent articles on cybercrime:

UK Cyber Crime Costs £27bn a Year - Government Report

Canada Hit by Cyberattack From China Computers:CBC

New Hacking Tools Pose Bigger Threats to Wi-Fi Users

Security to Ward Off Crime on Phones

Hacking of DuPont, J&J, GE Were Undisclosed Google-Type Attacks

Square's Mobile Credit Card Reader Easily Hacked, Says VeriFone