



The Franchise Valuations Reporter



Our Expertise

Within the franchise, distribution and dealership context, we are experts in:

- Damages, Valuations & Expert Testimony
- Finance, Accounting and Tax
- Cyber Security

Bruce S. Schaeffer, Editor
Bruce@FranchiseValuations.com
 212.689.0400

Have a Question About Succession Planning for Franchise Owners?

Call us for a free, confidential consultation. And we're always interested in your comments about the newsletter.

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We Write the Book

Franchise Regulation and Damages, the only treatise that covers damages in franchise disputes and valuations of franchises, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page [here](#).



Encroachment

Mercedes-Benz's Planned New Dealership Near Existing Dealer Could Have Been Unreasonable Under Colorado Law

A franchised Mercedes-Benz automobile dealership in Littleton, Colorado, could pursue its claim that Mercedes-Benz USA, LLC violated Colorado law by unreasonably approving a new dealership near it, according to the federal district court in Denver.[1]

[1] *European Motorcars of Littleton, Inc. v. Mercedes-Benz USA, LLC*, June 19, 2017, Hegarty, M.

Valuations

Are Valuation Experts Engaged in the Unauthorized Practice of Law?

In a recent article entitled "**Business Valuation is NOT the Unauthorized Practice of Law**"[1] the author - who clearly doth protest too much - says it is not and uses as proof a North Carolina ruling that teeth whitening is not the unauthorized practice of dentistry. In this writer's opinion the analogy is laughable. The author goes on to proclaim:

For example, since valuations consider only facts known or knowable as of the date of the valuation, communications with the client necessary for a valuation engagement are likely to involve completed agreements or current negotiations for which the client already has legal counsel. Those communications are not UPL.

If a valuation professional is engaged to assist on pricing a potential acquisition or sale of a business interest, it is imperative that the client also work with counsel. A valuator assisting counsel who is advising a client in a business transaction cannot, by definition, be engaged in UPL. The client is getting legal advice from counsel, not the valuator.

That's true but only so far as it goes. What about the valuator who holds himself or herself out as an expert in preparing buy-sell agreements? Isn't preparing contracts the practice of law? And what about endless citations to legal cases such as the BVR books on Lost Profits? Or Valuers who write books with chapters like "My Ten Favorite Cases"? IT IS BEYOND ARGUMENT THAT MANY VALUATORS, THOUGH SURELY NOT ALL, ARE PRACTICING LAW WITHOUT A LICENSE.

Six Sources of Differences in Expert Valuation Opinions

According to a recent post by the valuation expert Chris Mercer, who writes books about Buy-Sell Agreements although he is not a lawyer, "Judges often make the assumption that business valuation experts always (or almost always) provide the opinions that their clients want and that explains the wide differences they see in valuation opinions. This judicial attitude is fairly widespread based on my experience, and accounts for many decisions where courts 'split the valuation baby.'" He goes on to posit that there may be more than six sources of differences in opinions between opposing valuation

DISCLAIMER

The information provided in this newsletter is for informational purposes only and should not be construed as legal or expert advice which can only be obtained from appropriate professionals. Franchise Valuations, Ltd. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein.

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experts, to wit:

1. Differences in legal guidance or assumptions related to this guidance
2. Differences in information availability
3. Access to management and due diligence opportunities
4. Differences in valuation approaches or methods
5. Differences in appraiser judgments and assumptions
6. Mistakes

[1] Michael J. Molder, JD, CPA, CFF, CFE, CVA, MAFF NACVA Ethics Oversight Board Member, <http://www.nacva.com/content.asp?admin=Y&contentid=521>.

Federal Tax Alerts

IRS Warns Of New Phone Scam

The IRS has warned taxpayers of a new scam linked to the Electronic Federal Tax Payment System (EFTPS). The IRS reports the scam is being seen nationwide. In this latest iteration of impersonating an IRS agent, the con artist claims that certified letters were sent but were returned as undeliverable. The scammer threatens arrest if a payment is not made immediately through a prepaid debit card. The con artist also tells the victim that the card is linked to the EFTPS system when, in fact, it is controlled by the scammer.

"This is a new twist to an old scam. Just because tax season is over, scams and schemes do not take the summer off. People should remember that the first contact they receive from IRS will not be through a random, threatening phone call," Commissioner John Koskinen said. The EFTPS is an automated system offered by the U.S. Treasury and does not require the purchase of a prepaid debit card, the IRS explained. In addition, taxpayers have several options for paying a real tax bill and are not required to use a specific one.[1]

New Phishing Emails

The IRS is warning tax professionals about a new phishing-emails scam in which the sender poses as a tax software education provider. Criminals in these cases often use the name of a genuine U.S.-based preparer education firm. The fake emails try to obtain sensitive preparer data. The IRS further advised that legitimate businesses and organizations never ask for usernames, passwords or sensitive data via email and tax professionals must refrain from providing such information.[2]

[1] [IR-2017-107](#); [TRC IRS: 12,350](#).

[2] [IR-2017-111](#); [TRC IRS: 3,200](#).

Joint Employer Update

Black Car Drivers Are Independent Contractors, Not Employees

In *Saleem v. Corporate Transportation Group*,[1] the Second Circuit Court of Appeals upheld a district court ruling that drivers of "black cars" (big city services that provide cars instead of hailing a taxi) were not employees of a

franchisor dispatching system when they bought franchises. The Court found that the franchisor's oversight of the franchisee was not sufficient to create an employment relationship under the FLSA or the New York State Labor Law.

[1]2017 WL 1337227 (CA2 Apr. 12, 2017)

SBA Loans to Franchisees

Where Are the Statistics on Failure Rates for SBA Loans to Franchisees?

In the last issue I asked if anyone could point me to data. The eminent restaurant expert John Gordon advised me: To your Q on default statistics: several of us (Don, Coleman, Keith, myself and one other) had run ins with SBA in 2014/2015 (yes still Obama appointees there then)...and they since then are refusing to distribute the stats. This was partially in response to data complaints from our "friend", Derek Johnson. Coleman has submitted FOIA requests to little avail.

Succession Planning for Franchisees

Baby Boomer Transition Bubble Just Got Kicked Down the Road?

As we have often noted in this newsletter, ten thousand people a day in the US are turning 65 and contemplating retirement. Many of them are franchisees which many predicted would create a large bubble of businesses for sale. It has not yet materialized because in this time of economic uncertainty, many business owners have adjusted their retirement expectations - extending them about three years out.

Since it is reported that a low number of businesses sold during the 2008-2011 timeframe, there appears to be a backlog of business owners who would sell given the right circumstances. In terms of age, the leading edge of the baby boomers turns 71 this year. The lagging edge turns 53. There are 76-77 million boomers.

Article Published by the ABA

Eli Akhavan and I have written an article entitled "Succession Planning for Franchisees" which was published in the most recent issue of the *Franchise Law Journal*. If anyone wishes to read it we have provided a [link here](#).

Quotes from One of History's Most Evil

Joseph Stalin: *"The people who cast the votes don't decide an election; the people who count the votes do."*

Joseph Stalin: When asked, *"Do you know what gratitude is?"* by an old comrade he was about to have executed, Stalin replied, *"It's a sickness suffered by dogs,"* after which the comrade was executed in Siberia.